(26,813)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 727.

CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN, CHARLES NELSON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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1

Writ of Error

United States of America, ss:

The President of the United States,

To the Honorable, the Judges of the District Court of the United States for the Northern District of New York, GREETING: 2

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, complainant, and Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson, defendants, a manifest error hath happened, to the great damage of said defendants, as by their complaint appears. 3

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in their behalf, do command you if judgment therein be given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, before the judges aforesaid, on the 12th day of January, 1918; that the record and proceedings aforesaid being in- 4

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spected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, The Honorable Edward D. White, Chief Justice of the United States, the 14th day of December, in the
6 year of our Lord one thousand nine hundred seventeen, and of the Independence of the United States, one hundred forty-second.

WM. S. DOOLITTLE,
Clerk of the District Court of the U. S.

The foregoing writ is hereby allowed.
7 December 14th, 1917.

GEORGE W. RAY,
Judge of the U. S. District Court.

Indictment.

8 UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

At a stated Term of the District Court of the United States of America begun and held in the United States Court rooms at the City of Auburn, N. Y., on the 2nd day of October, 1917, before the Honorable George W. Ray, Judge of said Court.

Northern District of New York, ss.:

The Grand Jurors of the United States of America duly chosen and sworn, upon their oaths and affirmations, do present and indict that throughout the period of time from the 6th day of April, 1917, to the day of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government and that during said period of time Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson (hereinafter called defendants) at the City of Albany, State and Northern District of New York, and within the jurisdiction of this court unlawfully and feloniously have conspired, combined, confederated and agreed together and with divers other persons to said Grand Jurors unknown to interfere with, prevent, hinder and delay the execution of certain laws of the United States, to wit:

1. The joint resolution of the Senate and House of Representatives, dated April 6, 1917, "That, the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared."

2. The Proclamation and Regulations of the President of the United States, dated April 6, 1917, governing the conduct, treatment and disposition of alien enemies within the United States, made pursuant to Sections 4067, 4068, 4069 and 4700 of the Revised Statutes of the United States.

3. The Act of Congress approved June 3, 1916,

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and entitled, "An Act for making further and more effectual provision for the national defense, and for other purposes, special reference being had to the provisions of said act concerning enlistments and service in the several branches of the military forces of the United States.

14 4. The Act of Congress approved July 8, 1916, entitled, "An Act making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy ordnance for trial and service, and for other purposes."

5. The Act of Congress approved May 18, 1917, and entitled, "An Act to authorize the President
15 to increase temporarily the Military Establishment of the United States," the Proclamation of the President of the United States, dated May 18, 1917, setting the time for registration under said act; the Registration Regulations prescribed by the President of the United States, under authority of said act, on May 18, 1917, and the Rules and Regulations for Local and District Boards, pre-
16 scribed by the President of said act; special reference being had to the provisions of said act, proclamation and regulations for the registration, selection and draft of persons available for military services.

6. The Act of Congress approved June 16, 1917, and entitled, "An Act to punish acts of interference with the foreign relations, the neutrality,

nance for trial and service, and for other pur- 17
and the foreign commerce of the United States, to punish espionage, better to enforce the criminal laws of the United States, and for other purposes''; special reference being had to the provision of said act concerning the prosecution and punishment of persons wilfully causing or attempting to cause insubordination, disloyalty, mutiny, or 18
refusal of duty, in the military or naval forces of the United States, or wilfully obstructing the recruiting or enlistment service of the United States to the injury of the service and the United States or harboring or concealing persons who they know, or have reasonable grounds to believe or suspect, have committed, or are about to commit, offenses under Title I, of said Act; and to 19
the provisions of said Act concerning the prosecution and punishment of persons using or attempting to use the mails or postal service of the United States for the transmission of matter declared by Title XII of said act to be unmailable and especially of letters, writings, circulars, postal cards, pictures, prints, engravings, photographs, newspapers, pamphlets, books, and other publication 20
advocating or urging forcible resistance of the laws of the United States pertaining to the carrying on of said war against the Imperial German Government.''

7. The following sections of the Act of Congress approved March 4, 1909, and entitled ''An Act to codify, revise, and amend the penal laws of

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the United States," to wit, 4, 19, 21, 37, 42, 135, 136, 137 and 141.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that during said period of time the said defendants and each of them should and would discourage, obstruct and pre-
22 vent the prosecution by the United States of said war between the United States and the Imperial German Government and prevent, hinder and delay the execution of said laws above enumerated by personal solicitations, public speeches and various pamphlets which they should and would distribute and circulate intending and attempting to cause and influence various persons available
23 for military duty to fail to register and to refuse to submit to registration and draft for services in said military and naval forces and to fail and refuse to enlist for service therein and by inciting others, so to do notwithstanding the requirements of said laws in that behalf and notwithstanding the patriotic duty of such persons and others to so register and submit to registration and draft and so to enlist for service in said mili-
24 tary and naval forces and notwithstanding the cowardice involved in such failure and refusal, all of which was to be accomplished by the use of all the means and methods aforesaid as a protest against and as a forcible means of preventing, interfering with, hindering and delaying the execution of said laws of the United States and also to interfere with, hinder and delay the Government

of the United States in its lawful efforts to build up and maintain an army for the carrying on of said war with the Imperial German Government.

Overt Acts.

That during the continuance of said conspiracy and for the purpose of effecting the object of the same, the said defendants and each of them did in and about the City of Albany on the 26th day of August, 1917, make personal solicitations from various persons whose names are to the Grand Jurors unknown.

And further during the continuance of said conspiracy and for the purpose of effecting the object of the same, the said defendants and each of them did on the 26th day of August, in and about the City of Albany make public speeches.

And further during the continuance of said conspiracy and for the purpose of effecting the object of the same, the said defendants and each of them did publish and distribute to John C. Bain, John F. Lookey and John Skelly and other persons to your Grand Jurors unknown in and about the said City of Albany, certain pamphlets headed "The Price We Pay," a copy of which is hereto attached and marked Schedule "A" and made a part hereof, all of which personal solicitations, public speeches and pamphlets persistently urged persons eligible to enlist to refuse to enlist in military and naval services of the United States and were intended to hinder, injure and delay the

United States Government in its efforts to select and maintain an army for its defense in the said war, with the Imperial German Government and tended to interfere with, prevent, hinder and delay the execution of the Laws of the United States hereinbefore mentioned, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Two.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and indict that throughout the period of time from April 6, 1917, to the date of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government and that during said period of time Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson (hereinafter called defendants) at the City of Albany, State and Northern District of New York, and within the jurisdiction of the court unlawfully and feloniously have conspired, combined, confederated and agreed together and with divers other persons to said Grand Jurors unknown to commit a certain offense against the United States, to wit: The offense of unlawfully, feloniously and wilfully attempting to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States when the United States was at war and to the injury of the United

States in, through, and by personal solicitations, public speeches and distributing and publicly circulating throughout the United States certain articles printed in pamphlets called "The Price We Pay," which said pamphlets were to be distributed publicly throughout the Northern District of New York, and which said solicitations, speeches, articles and pamphlets would and should persistently urge insubordination, disloyalty and refusal of duty in the said military and naval forces of the United States to the injury of the United States and its military and naval service and failure and refusal on the part of available persons to enlist therein and should and would through and by means above mentioned obstruct the recruiting and enlistment service of the United States when the United States was at war to the injury of that service and of the United States.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that in and for executing said unlawful and felonious conspiracy, combination, confederation and agreement in this court of this indictment certain of said defendants at the several times and places in that behalf mentioned in connection with their names under the heading, "Overt Acts" in the first count of this indictment, have done certain acts, that is to say, the several acts mentioned in said first count under said heading, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

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Count Three.

And the Grand Jurors aforesaid upon their oaths aforesaid do further indict and present that throughout the period of time from April 6, 1917, to the date of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government; that dur-
38 ing said period of time and on the 26th day of August, 1917, at the City of Albany, State and Northern District of New York and within the jurisdiction of this court, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson (hereinafter called defendants) did unlawfully, wilfully and feloniously make, distribute and convey to John C. Bain, John F. Lookey and John Skelly,
39 publicly and to various persons in and about said City of Albany the names of said persons being to your Grand Jurors unknown, false reports and false statements in and through certain pamphlets herein attached and made a part hereof and headed "The Price We Pay," which said false statements and false reports were in part as follows:

40 "Into your homes recruiting officers (meaning U. S. Army Recruiting Officers) are coming. They will take your sons of military age and **impress** them into the army.

"And still the recruiting officers will come, seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size.

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from gamblers.

"Our entry into it (meaning the entry of the United States into the war with Germany) was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated and those American investors who bit on his promise would be hooked."

All of which statements and reports were and are wholly false and untrue and said statements and reports were so made, distributed and conveyed by the said defendants to the injury of the United States and its military and naval service and with the intent then and there to interfere with the operation and success of the military and naval forces of the United States at a time when the United States was at war, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Four.

And the Grand Jurors aforesaid upon their oaths aforesaid do further indict and present that throughout the period of time from April 6, 1917, to the date of the finding and presentation of this

Count Four

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indictment, the United States has been at war with the Imperial German Government; that during said period of time and on the 26th day of August, 1917, at the City of Albany, State and Northern District of New York, and within the jurisdiction of this Court, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson, (hereinafter called defendants) did unlawfully, wilfully and feloniously make, distribute and convey to John C. Bain, John F. Lookey, and John Skelly publicly and to various persons in and about said City of Albany, the names of said persons being to your Grand Jurors unknown, false reports and false statements in and through certain pamphlets herein attached and made a part hereof and headed "The Price We Pay," which said false statements and false reports were in part as follows:

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"Into your homes recruiting officers (meaning U .S. Army Recruiting Officers) are coming. They will take your sons of military age and **impress** them into the army.

"And still the recruiting officers will come, seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size.

48

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from gamblers.

"Our entry into it (meaning the entry of the United States into the war with Germany) was determined by the certainty that if the allies did not win, J. P. Morgan's loans to the allies will be repudiated and those American investors who bit on his promises would be hooked."

All of which statements and reports were and are wholly false and untrue and said statements and reports were so made, distributed and conveyed by the said defendants with the intent then and there to interfere with the operation and success of the military and naval forces of the United States, at a time when the United States was at war, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Five.

And the Grand Jurors aforesaid upon their oaths aforesaid do further indict and present that throughout the period of time from April 6, 1917, to the date of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government; that during said period of time and on the 26th day of August, 1917, at the City of Albany, State and Northern District of New York and within the jurisdiction of this court, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, and Charles Nelson (hereinafter called defendants) did unlawfully, wilfully

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and feloniously attempt to cause insubordination disloyalty, mutiny and the refusal of duty in the military and naval service of the United States when the United States was at war in, through and by means of articles printed in certain pamphlets headed "The Price We Pay," a copy of which is hereto attached and marked Schedule
54 "B" and made a part hereof, and which said pamphlets were then and there and on the 26th day of August, 1917, published, circulated and distributed by the defendants in and about the said City of Albany to John C. Bain, John F. Lookey and John Skelly, and to various other persons and at various places, all to the injury of the United States and the military and naval service thereof, the par-
55 ticular persons and places being to your Grand Jurors unknown, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Six.

56 And the Grand Jurors aforesaid upon their oaths aforesaid do further indict and present that throughout the period of time from April 6, 1917, to the date of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government; that during said period of time and on the 27th day of August, 1917, at the City of Albany, State and Northern District of New York, and within the

Count Six

jurisdiction of this court, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, and Charles Nelson (hereinafter called defendants), did unlawfully, wilfully and feloniously attempt to cause insubordination, disloyalty, mutiny and the refusal of duty in the military and naval service of the United States when the United States was at war in, through and by means of articles printed in certain pamphlets headed "The Price We Pay," a copy of which is hereto attached and marked Schedule "B" and made a part hereof, and which said pamphlets were then and therefore and on the 27th day of August, 1917, published, circulated and distributed by the defendants in and about the said City of Albany to John C. Bain, John F. Lookey, and John Skelly, and to various other persons and places being to your Grand Jurors unknown, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FRED R. RICH,
Foreman of the Grand Jury.

DENNIS B. LUCEY,
District Attorney in and for the Northern District of New York.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

against

62 CLINTON H. PIERCE, ANGELO CREO, CHARLES S. ZEILMAN and CHARLES NELSON.

The defendants herein demur to the indictment presented against them by a Grand Jury, at a Stated Term of said Court, begun and held in the
63 United States Court Room, City of Auburn, N. Y., before the Hon. George W. Ray, Judge of said Court, on the following ground:

1st. Upon the ground that the facts set forth therein are not sufficient to constitute the crimes specified or any crime under the Statutes of the United States.

64 2nd. That there are no facts set forth in said indictment showing conspiracy on the part of the defendants or any of them to hinder or prevent the execution of the laws of the United States or of any of the particular laws specified in said indictment.

3rd. That there are no facts set forth showing the personal solicitation or public speeches by de-

fendants or any of them intending and attempting to cause and influence various persons or any person available for military duty to fail to register or to refuse to submit to registration and draft as set forth in said indictment. 65

4th. That the contents or the circulation of the pamphlets entitled "The Price We Pay" in whole or in part by all or any of the defendants does not constitute the crime of conspiracy or any crime under the laws of the United States or any of the statutes set forth in said indictment. 66

5th. That said indictment is too indefinite to properly inform defendants as to the solicitation and speeches made by them or any of them, tending to induce others to fail to obey the laws of the United States or to obstruct the execution of said laws as set forth in said indictment. 67

WHEREFORE, defendants ask the dismissal of said indictment against each and all of these defendants.

FREDERICK A. MOHR,
Attorney for Defendants,
53 Genesee Street, 68
Auburn, N. Y.

69

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK.

THE UNITED STATES,

against

70 CLINTON H. PIERCE, ANGELO CREO, CHARLES S. ZIELMAN, and CHARLES NELSON.

Demurrer to indictment which charges conspiracy under sec. 37 of the Criminal Code, and also violations of secs. 3 and 4 of the so-called Espionage Act.

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D. B. Lucey, Ogdensburg, N. Y., for the United States.

Frederick A. Mohr, Auburn, N. Y., for defendants.

RAY, District Judge.

72 Since April 6, 1917, the United States has been at war with the Imperial German Government on which day the Congress of the United States by joint resolution duly approved stated "That the state of war between the United States and the Imperal German Goverment which has thus been thrust upon the United States is hereby formally declared" &c.

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May 18, 1917, Congress enacted what is commonly and popularly known as the selective draft act, approved that day. This act provides for the increase of the regular army; the enlistment of men in the military service of the United States and the drafting of men for the purpose. This was done to enable the United States to prosecute the war thus thrust upon us to a successful 74
determination. June 5, 1917, Congress enacted what is commonly known as the espionage act, approved that day, and which is entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United Staes, to punish espionage and better to enforce the criminal laws of the United States, and for other purposes." Section 3 of this 75
act reads as follows:—

> "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and
> whoever, when the United States is at war, 76
> shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of

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not more than $10,000 or imprisonment for not more than twenty years, or both."

It is seen at a glance that whoever, when the United States is at war, wilfully makes or conveys false reports or **false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies,** commits a crime against the United States. It is not necessary that the operation or success of the military or naval forces be actually interfered with, or that the success of its enemies be actually promoted. The making or conveyance of false reports or false statements **with the intent** to interfere with the operation or success of either the military or naval forces of the United States or to promote the success of the enemies of the United States is all sufficient.

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The defendants have extensively circulated and spread broad cast a printed pamphlet or circular containing with other things the following:

"Conscription is upon us; the draft law is a fact!

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"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army.

"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

"Guns will be put into their hands; they

81 will be taught not to think, only to obey without questioning.

"Then they will be shipped through the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go. 82

"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; and every pang will be multiplied in its passage to you.

"Black death will be a guest at every American fireside; mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark. 83

"And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

84 "And still the toll of death will grow.

"Let them come! Let death and desolation make barren every home! Let the agony of war crack every parent's heart! Let the horrors and the miseries of the world downfall swamp the happiness of every hearth stone!"

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To this is added:

> "Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!"

Then after referring to the war and its horrors
86 we find the following:

> "You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay."

To this is added:

87 > "It is the price you pay for your stupidity —you who have rejected Socialism!"

Then, after referring to food prices, we find the following:

> "The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Ban-
88 ner is played, that he has no time to protect the food supply from gamblers."

Then later:

> "We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely, killing. * * *.

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"We have been telling you all for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity; but you laughed at us.

"Now you call every person traitor, slacker, pro-enemy, who will not go crazy on the subject of killing; and you have turned the whole energy of all the nations of the world into the service of their kings for the purpose of killing—killing—killing. 90

"Why would you not believe us when we told you that it was possible to co-operate for the saving of life?

"Why were you not interested when we begged you to work all together to build, instead to destroy? To preserve, instead of to murder? 91

"Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellow-workers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man? 92

"Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded—you are paying for them now.

"—Lo, the price you pay! Lo, the price your children will pay. Lo, the agony, the

93 death, the blood, the unforgetable sorrow,—

"The price of your stupidity!

* * * *

VII.

94 "For this war—as every one who thinks or knows anything will say, whenever truth telling becomes safe and possible again,—this war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

95 "It is to determine whether interest, dividends and profits, shall be paid to investors speaking German or to those speaking English and French.

"Our entry into it was determined by the certainty that if the allies do not win J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

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We have here not only lurid and exaggerated pictures of the horrors of war, possible and impossible, but many false statements calculated to incite opposition to the war and opposition to the government and also calculated to interfere with the morale of our armies, discourage enlistments, registration and willing service in our armies and

encourage desertion. These false statements are also calculated to encourage our enemies and discourage and intimidate our own citizens and soldiers and thereby promote the success of our enemies. It is not true that the recruiting officers will take our sons of military age and "impress them into the army." It is not true that "You are being dragged, whipped, lashed, hurled into it," (the army or the war). It is not true that "The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers." The Attorney General of the United States is not doing anything of the kind. It is not true that "We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely--killing." It is not true that "Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you have turned the whole energy of all the nations of the world into the service of their kings for the purpose of killing—killing—killing." It is not true that "Our entry into it (this war) was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated and those American investors who bit on his promises would be hooked." Here is a plain assertion to every intelligent mind, that the declaration of war to which reference has been made contains a falsehood and that such declaration was made because

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101 of the fear that the allies might not win and that in such case J. P. Morgan's loans to the allies would be repudiated, payment refused, and that American investors would lose their loans and suffer loss. In other words that our entry into this war with Germany was determined upon by Congress to insure, if possible, the success of the al-
102 lies to the end that they would fulfill their contracts and pay the loans made them by individuals in the United States. The purposes and motives of our President and of Congress are impugned and grossly misrepresented and falsified. What reports or statements can be more or better calculated to interfere with the operation and success of our military and naval forces in this war or
103 more or better calculated to promote the success of the enemies of the United States?

It is said first this pamphlet is an argument in favor of socialism and of the socialistic party, and second that such publications are proper and allowable under our Constitution which prohibits curtailment of freedom of speech and of the press.

The first amendment to the Constitution of the
104 United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or **abridging the freedom of speech, or of the press;** or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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If this means that every man and woman in the United States in times of war and national peril may falsely state or say in words, or by means of pamphlets and writings printed and spread broadcast, anything and everything he pleases, however injurious to the general welfare and however grossly false the statements and however detrimental to the success of our military and naval 106
forces the falsehood may be and that Congress is powerless to enact a law abridging this right then the law under consideration is unconstitutional except in so far as it merely **prohibits the circulation and distribution** of such pamphlets containing the false reports and false statements of the nature described. In Warren v. United States, 183 Fed., 718, 721, the Circuit Court of Appeals, 107
eighth circuit, said, "Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances" &c.

In United States v. Toledo Newspaper Co., 220 Fed., 458, it is held that the constitutional guarantee of freedom of the press is not infringed by summary process and conviction of contempt for 108
publication tending to obstruct the administration of justice. If this be correct why may not Congress enact a law making it an offense to make and spread broadcast when a state of war exists, pamphlets containing materially false statements which are intended to interfere with and obstruct the lawful raising and organization

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of armies and the military operations of the government and which pamphlets are calculated to have that effect? Suppose a man goes out and publicly advocates by means of false statements the overthrow of our national government, the disbandment of our lawfully created national armies, organized for national defense in time of war, and
110 puts his false declarations and statements in pamphlet form and circulates them, can it be doubted that Congress may constitutionally prohibit such acts? In State v. Pape, 90 Conn., 98, it is held, "Liberty of speech and of the press is not license, not lawlessness, but the right to fairly criticise and comment." See also Ex parte Bird, 5 Porto Rico, 241.

111 In Turner v. Williams, 194 U .S., 279, 294, Mr. Chief Justice Fuller said:

> "The flaming brand which guards the realm where no human government is needed still guards the entrance; and as long as human governments endure **they cannot be denied the power of self preservation** as that question is presented here."

112 The act of Congress in question here is one obviously enacted and necessary for the preservation of our government and the enforcement of its rights. In my judgment to deny its constitutionality is to deny to the government of the United States the power of self preservation by suppressing the publication and distribution of false statements made with the intent to destroy the

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morale and efficiency of our armies when engaged in lawful warfare and prevent or interfere with their lawful organization and the lawful recruiting thereof. Such publications give aid and comfort to the enemy.

If a jury on evidence should find that this pamphlet contains false statements calculated to discourage our armies and enlisted men, discourage compliance with our draft laws and interfere with their enforcement, or impair the morale of our armies, and that it was the intent of the writer and distributor to bring about such results, can it be justified on the theory that our constitution warrants and protects the making of such false statements disseminated for such purpose? I think not. Freedom of speech and of the press does not give liberty to the individual to prevent or interfere with the preservation of our government, or the organization and success of our armies and this may not be done under the guise of advocating the principles of a political party or the principles of socialism. In the instant case the language employed and contained in this pamphlet is for the consideration of the jury and it will be for the jury to say whether or not the statements made, if proven to be false, were wilfully made with intent to interfere with the operation or success of our military or naval forces, or to promote the success of our enemies, or wilfully attempt to cause insubordination, or refusal of duty in such forces of the United States.

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This intent may be inferred from the nature and character of the false statements made and promulgated and the surrounding circumstances and conditions and on a consideration of the conditions under which made and of the persons to whom made. The false statements must be wilfully made and their making and promulgation
118 must be accompanied by the intent specified. Intent is a question of fact. Every sane person is presumed to intend the natural and known consequences of his acts voluntarily and knowingly done and of words used.

It is for the jury to say or will be, probably, under all the evidence in the case if proof is given tending to sustain the allegations of the indict-
119 ment whether the defendants in spreading and distributing these pamphlets were merely advocating the principles and doctrines of the socialistic party, or were attempting to discourage the war, enlistments and recruiting and impair the morale of our army and thereby interfere with the operation and success of the military and naval forces of the United States to the injury of the United
120 States and intended so to do.

Depicting the horrors of war, the devastation of country and destruction of life and property caused by war, may present an argument against engaging in war unnecessarily,—a reason for not doing so,—but when coupled with materially false statements and representations as to what the officers and representatives of the government

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are doing and as to why the war was engaged in or declared by the law making body of the nation, the realm of legitimate argument and free speech is departed from a question of fact is presented for the decision of a jury whether the horhors of war were depicted and the false statements made to advance and promulgate the principles of a political party or to interfere with and destroy 122
the efficiency of our armies and interfere with the operation and success of our military and naval forces and promote the success of the enemies of the United States. It must be that "free speech" and "freedom of the press" has its limitations and do not include and protect the making and promulgation of false statements knowingly made with intent to destroy our armies in time of war 123
and interfere with and prevent the enforcement of our laws.

It is urged that the conspiracy counts are insufficient in that they do not charge what the conspiracy was or what the conspirators were to do. The indictment charges that "throughout the period of time from the 6th day of April, 1917, to the day of the finding and presentment of this in- 124
dictment" (October 25, 1917), the United States has been at war and that "**during** said period of time the defendants," naming them, within the Northern District of New York at Albany, N. Y., "unlawfully and feloniously have conspired, combined, confederated and agreed together * * * to interfere with, prevent, hinder and delay the

125 execution of certain laws of the United States, to wit." These laws are then specifically named and pointed out. It is charged to have been a continuing conspiracy commencing on a day certain and continuing in force and operation down to the date of the indictment. The indictment then charges "that during said period of time" that is,
126 from the beginning to the end thereof, the conspiracy was that each of said defendants "should and would discourage, obstruct and prevent the prosecution by the United States of said war between the United States and the Imperial German Government and prevent, hinder and delay the execution of said laws (the ones specified and pointed out) above enumerated, by personal solici-
127 tation, public speeches, and various pamphlets which they should and would distribute and circulate, intending and attempting to cause and influence various persons available for military duty to fail to register and to refuse to submit to registration and draft for service in said military and naval forces and to fail and refuse to enlist for services there in" &c. Then follows the charge of
128 overt acts in execution of such conspiracy. Nothing is said to the effect that the conspiracy includes the use or distribution of pamphlets containing false or untrue statements, but it is charged that defendants conspired to wilfully cause and attempt to cause insubordination and refusal of duty, &c. The pamphlet is attached to and made a part of the indictment. Certain parts are quoted

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in the body of the indictment and the statements quoted and other parts are alleged to be false. It is urged by defendants that the statements of fact contained in the pamphlet are but the expression of an opinion as for instance, "Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army." The word "impress" in connection 130
with the creation of an army implies the use of force and the words of the pamphlet may be found to be calculated and intended to create the belief that recruiting officers are going and do go into our homes and by force and without any preliminary selection for military service in accordance with law, size and force into the army and navy the sons of our citizens. The statement is calculated 131
and may have been intended to create a feeling against recruiting, the selective draft act and the officials of the government. Such statements inspire resistance and strengthen the determination of those disposed to be at all recalcitrant. It may be that there is no direct statement that one is in duty bound to resist but it is plainly taught and indicated that it will be to the interest of many 132
if not all to resist. Is the quoted statement a mere expression of opinion as to what is being done or is to be done? Is it not a bald statement of what is being done and is to be done under a law of Congress which justifies no such act by a recruiting officer? Then take this statement, "The Attorney General of the United States is so busy

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sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from gamblers."

Is this an expression of opinion merely or is it a bold bald assertion that a fact exists, that a thing has been done and repeatedly done by the highest law officer of the National Government without
134 warrant of law? Is it not an assertion well calculated to excite hatred of this high official of the government, by asserting that he is doing unlawful acts and so busily engaged in the doing that he pays no attention to the enforcement of laws providing for food conservation. Such statements are likely to be given credence in certain localities by certain classes and so incite opposition to the
135 government and opposition to law and its enforcement. It seems clear to me that these and other statements above quoted and found in the pamphlet are to be considered by the jury which is to determine their truth or falsity, the wilfulness of the act, and the intent and purpose of the ones who made and promulgated them.

Section 3 of the so-called Espionage Act, here-
136 inbefore quoted, clearly points out three classes of acts constituting offenses thereunder. The first consists in the wilful making or conveying false reports or statements with the intent specified. The second consists in wilfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The third consists in

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wilfully obstructing the recruiting or enlistment service of the United States **to the injury of the service of the United States.** It may be a question whether the making and conveyance of false reports and statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies must be accompanied by an in- 138
tent and purpose to injure the service of the United States and whether such false reports and statements must be of a nature or character which would injure the service of the United States. So it may be a question whether one who wilfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty must intend and purpose to injure the service of the United 139
States. In short do the words "to the injury of the service of the United States" relate back to and qualify each of the clauses of the section? Must the indictment allege and must the government prove not only that the United States is at war, and that the false reports and statements were made and conveyed with intent to interfere with the operation or success of the military or 140
naval forces, but that such acts actually resulted either in injury to the service of the United States or were intended so to do? This is true as to obstructing the recruiting and enlistment service as the section so says in plain terms. But the obstruction need not be physical and all obstruction of such service is injurious to the service of the

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United States. Obstruction does not necessarily imply prevention. The flowing stream of water may be obstructed and often is while its continuous onward flow is not wholly prevented and its ultimate onward flow may not be prevented at all. Any and all acts and words or writings that **interfere** with the operation or success of the military
142 or naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings, to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States in time of war work to the injury of the service of the United States. When Congress wrote into section 3, above quoted, the words "or shall wilfully obstruct the recruit-
143 ing or enlistent service of the United States, **to the injury of the service of the United States,**" it may have had in mind the hundreds and thousands of cases where fathers and mothers and brothers and sisters will obstruct in a way and to an extent the recruiting and enlistment service by urging and soliciting their sons and brothers not to enlist. No one will contend, I think, that such an act will
144 be held a wilful obstruction of the enlistment service to the injury of the service of the United States within the intent and meaning of section 3 of the act under consideration. But should some third person go about soliciting and urging young men not to enlist, extravagantly and untruly depicting the horrors and dangers and consequences of war, impugning the motives and purpose of the

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President and Congress in declaring war and misrepresenting the objects sought to be attained by our government in declaring the existence of a state of war, we have a case where a jury well may find a wilful obstruction of the recruiting or enlistment service of the United States to the injury of the service of the United States even if the government is unable to prove that a single person 146
was induced by such acts not to enlist when otherwise he would have enlisted.

Counts one and two of the indictment charge conspiracy. The other counts charge the offenses specified in section 3 of the so-called Espionage Act and charge the making and conveyance of false reports &c., and the wilful attempting to cause insubordination, &c., in two ways,—"to the 147
injury of the service of the United States" and also in another count without this clause. I think either count sufficient in law. The count which charges the wilful obstruction of the recruiting and enlistment service also charges that it was done to the injury of the United States and is clearly sufficient.

The indictment seems to have been drawn with 148
care and with abundant caution and is sufficiently definite as to time and place. The places where these offenses are alleged to have been committed is the City of Albany in the Northern District of New York. The time is specified. It was not necessary to specify the street and number of the house or business place where the conspiracy was

149 formed, or to charge that it was formed on a particular day specified to the exclusion of other days inasmuch as it is charged as a continuing conspiracy commencing on a day specified and continuing in effect and operation each day down to the time of the finding of the indictment. It was not necessary to set out what each alleged conspira-
150 tor said. A conspiracy may be established by proving the acts of the alleged conspirators done within and during a specified time all the defendants working in concert to bring about a certain unlawful result. It may not be possible and it is unnecessary to prove the words spoken by the alleged conspirators in forming the alleged conspiracy provided the acts done by them and prov-
151 ed show concert of action by the participants necessarily tending to the joint consummation of the specified crime.

Citizens have the right to criticise the existing laws, point out their defects, injustice and unwisdom and advocate their amendment or repeal, but they have no constitutional right to counsel, advise, encourage and solicit **resistance** to the exe-
152 cution of or refusal to obey them. A political party and its individual members may advocate the repeal of existing laws, their amendment and improvement and point out defects and a political party may be formed for this very purpose. However a so-called political party may not be formed to resist the execution of existing laws claimed to be unwise, unpatriotic and oppressive and its

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members permitted to encourage and advocate resistance to their due execution because of their membership therein. The wilful resistance to the execution of a valid law may be made a crime as may the wilful obstruction of its enforcement. Any and all resistance and any and all obstruction to the operation or enforcement of a law may be declared an offense. It is the duty of all persons 154 to obey the law and in lawful ways when called upon by due authority to aid in its enforcement. If this is not true no government can survive.

I find no ground for sustaining the demurrer to the indictment or to any count thereof and same is overruled.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

Plaintiff,

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against

CLINTON H. PIERCE, ANGELO CREO and CHARLES S. ZEILMAN,

Defendants.

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159 To Hon. Dennis B. Lucy, U. S. Attorney:

TAKE NOTICE that defendants demand a bill of particulars as to the offenses charged in the indictment presented against them at a stated term of the District Court of the United States begun and held in its Court Rooms, in the City of Auburn, N. Y., on the 2nd day of October, 1917, before the Hon. George W. Ray, Judge of said Court

160 as follows:

Count One.

1. A statement showing definitely the particular times and dates, and the places of assemblage in particular, at which the defendant or any of them made and entered into the felonious agreement charged in the indictment, upon which you

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intend to offer evidence upon the trial of the defendants or any of them.

2. A statement showing the times, places and persons with their names, in particular, together with the language or the substance thereof, used by the defendants or any of them in the personal solicitations set forth in said indictment under the heading "Overt Acts" as acts performed by the defendants or any of them on the 26th day of August, 1917, for the purpose of effecting the objects of the conspiracy alleged to have been entered into in said indictment.

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3. A statement showing the particular places, streets or halls in which the defendants, or any of them, made public speeches in furtherance of and to effect the objects of the alleged unlawful conspiracy, entered into by defendants, said statement also showing the remarks, words and language of defendants or any of them, or the substance thereof, upon which the prosecution relies as being the overt act or acts performed by defendants in furtherance of their unlawful purpose as set forth in said indictment.

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Count Two.

4. A statement showing the particular personal solicitation together with the language, or the substance thereof and public speeches in particular, together with the languages or the subject thereof used on each occasion upon which the

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prosecution relies to show that the defendants or any of them sought to cause insubordination, disloyalty and refusal of duty and all the other unlawful objects set forth in said Count Two of said Indictment.

Defendants also herewith demand the names and addresses of all the witnesses sworn by the
166 government before the Grand Jury in this proceeding or action.

FREDERICK A. MOHR.
Attorney for Defendants,
53 Genesee Street,
Auburn, N. Y.

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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF NEW YORK.

THE UNITED STATES,

against

CLINTON H. PIERCE, et al.

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Motion by defendants for bill of particulars as to counts one and two of an indictment for conspiracy and violation of section 3 of the so-called Espionage Act.

Frederick A. Mohr, Auburn, N. Y., for the defendants and the motion.

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Dennis B. Lucey, United States Attorney, Ogdensburg, N. Y., for the United States, opposed.

RAY, District Judge.

1. The counts of this indictment as to which a bill of particulars is demanded charge a continuing conspiracy to commit a crime or crimes against the United States and overt acts committed in pursuance and execution thereof. As to the times and places when and where the conspiracy was entered into the indictment is sufficiently definite and specific,—as definite and specific as safely to the rights of the United States it can be made, and, clearly, it is so definite, specific and certain in these regards that the defendants are put on notice and cannot be harmed by reason of

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173 indefiniteness in the allegations. The place is the city of Albany, N. Y., and the time is each and every day from April 6, 1917, to the date of the indictment.

2. I do not think the United States Attorney should be compelled to undertake to disclose the names of persons solicited by the defendants or
174 the particular time or days when such solicitation took place, or to undertake to give the language used by defendants in making such solicitations further or more specifically than is set forth in the indictment. It is sufficient to put the defendants on notice as to what they must meet on the trial. The general substance of what is alleged to have been stated by them is set forth.

175 3 and 4. The same remarks apply to claims 3 and 4 of the notice or demand for a bill of particulars.

Generally, the indictment gives the names of some of the persons to whom the pamphlets were given and distributed and also states that the names of the persons solicited are to the grand
176 jurors unknown. It is also stated that the various places in Albany, that is, the particular places where the circulars were circulated and distributed by defendants are to the grand jurors unknown.

When the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused the court may

177 direct that a bill of particulars be furnished him so that he may properly prepare his defense. Kettenbach v. United States, 202 Fed. R. 377, 382. The granting or refusal of the bill of particulars rests in the sound discretion of the court. Rosen v. United States, 161 U. S., 29, 35; Bruce v. United States, 106 Fed. R. 680, 682. When a bill of
178 particulars is once made and served "it concludes the rights of all parties who are to be affected by it, and he who has furnished a bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration." Commonwealth v. Giles, 1 Gray (Mass.) 466, cited and approved in Dunlap v. United States, 165 U. S., 486, 491. In United States
179 v. Adams Express Co., 119 Fed. R. 240, it is said, "The office of a bill of particulars is to advise the court, or more particularly the defendant of what facts, more or less in detail, he will be required to meet, and the court will limit the government in its evidence to these facts set forth in the bill of particulars." It is seen that this court ought not to direct a bill of particulars which if made and
180 served may seriously limit and embarrass the government in its legal proof and result in shutting out evidence of certain pertinent facts not now fully known to the United States attorney. It is not to be presumed the United States will offer false or perjured testimony on the trial and in view of the nature of the case and of the charges

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made it may be assumed the defendants know when and where they made speeches, if any solicitations, if any, and the nature and character thereof and also the names of the persons solicited, if any particular person was solicited. I do not think the government should be compelled to disclose the names of its witnesses. It is charged
182 in the indictment that August 26, 1917, the defendants made personal solicitations (meaning in aid and execution of the conspiracy charged) from "various persons whose names are to the grand jurors unknown." If the names are unknown to the grand jurors it is fair to presume such names are unknown to the United States attorney. The court should not require that officer to undertake
183 to give information he does not possess or in default shut out competent proof on the trial. It is charged as an overt act that August 26, 1917, in and about the city of Albany, the defendants and each of them made public speeches in aid and execution of the conspiracy. The indictment gives the names of some of the persons to whom pamphlets were distributed and a copy of the pamphlet
184 is attached to and made a part of the indictment. The indictment says that the names of others to whom such pamphlet was distributed are to the grand jury unknown. The defendants call for a bill of particulars not only giving times, places and names of persons, but the language or substance thereof used by defendants in personal solicitation under the heading "overt acts." As

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already stated it would be impracticable to require the United States to set out the evidence which it expects to give on the trial. The nature and character and general substance of these solicitations is set forth by charging the nature and character of the conspiracy and what defendants conspired to do and bring about. The overt acts charged, giving time and place with reasonable 186
certainty, state that pamphlets were distributed, copies of which are made a part of the indictment, speeches made in aid and execution and furtherance of such conspiracy and personal solicitations indulged in. I think this sufficient to apprise the defendants that evidence will be offered that in such speeches and solicitations defendants spoke words and used language encouraging and advis- 187
ing others to do or cause to be done the very things they are charged with having conspired to do. The allegations of the indictment is notice to the defendants that they must be prepared to meet such proof. Solicit means to ask, request, urge &c., and it being charged that defendants had agreed to do certain acts and that defendants solicited persons to aid in doing such acts the na- 188
ture and character of the solicitations is so clearly and sufficiently indicated that defendants cannot be prejudiced on the trial. The witnesses called to prove the solicitations on a given occasion may disagree as to the words used by the defendants while agreeing as to the substance and meaning of the words used and some of the language. It

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would be prejudicial to the United States to compel it to set out the language each witness is expected to testify to as having been used by a defendant on a given occasion. Each witness will be entitled to testify to what he recollects was said and the question will be was the language actually used to promote or aid in the execution of the con-
190 spiracy if one is found to have existed. The precise words used may not be material and it would be wrong to put the government in a position where it would be precluded from proving what was actually said on a given occasion should the witness on the trial vary from the language of the statement he is now expected to testify to. The defendants demand that they be furnished "the
191 names and addresses of all the witnesses sworn by the government before the grand jury in this proceeding or action." In some of the states such a demand may be made and must be complied with. In other states the names of such witnesses must be indorsed on the indictment, but this practice does not obtain in the United States courts. United States v. Bulter, Fed. Cas. No. 14700; Un-
192 ted States v. Aviles, 222 Fed., 474; Jones v. United States, 162 Fed. R. 417. Sec. 1033 R .S. U. S provides that in cases of treason and capital offenses a list of jurors and witnesses must be furnished the defendant. (See 3 U. S. Comp. St., 1916, Annotated, sec. 1699, p. 3556). There is no federal statutory provision going beyond this. "If a federal prisoner is not indicted for a capital of-

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fense, he is not entitled as of right to a list of witnesses." Jones v. United States, 162 Fed. R. 417, writ of certiorari denied 212 U. S., 576. "In cases not capital the United States attorney is not bound to furnish defendant with the names of witnesses." United States v. Butler, Fed. Cas. No. 14700. "The court may not in advance of the trial of a case not capital require the United States attorney to give 194 defendant a list of witnesses examined by the grand jury." United States v. Aviles, 222 Fed. R. 474, 477. The 6th amendment to the Constitution providing that the defendant shall be confronted with the witnesses against him only means that defendant is entitled to attend the trial and to hear the witnesses testify and does not entitle such defendant to a list of the witnesses who testified be- 195 fore the grand jury. United States v. Aviles, 222 Fed. R. 473. No facts appear calling upon the court to exercise any discretion it may possess in this regard in this case.

The application for a bill of particulars and a list of witnesses is denied.

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BILL OF EXCEPTIONS

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THE UNITED STATES OF AMERICA,

vs.

CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN
198 and CHARLES NELSON.

Federal Building, Auburn, N. Y.
November 13, 1917.

Before

HON. GEO. W. RAY, and a jury.

Appearances:

199 D. B. LUCEY, Esq., U. S. District Attorney;

FRANK J. CREGG, Esq., Asst. U. S. District Attorney;

FREDERICK A. MOHR, Esq., Auburn, N. Y., Attorney of record for all of Defendants;

200 LEWIS T. HUNT, Esq., Albany, N. Y., Attorney of record for all of Defendants.

EDWIN T. TALAFIERRO, Esq., of New York City, Counsel for Defendants, Nelson and Creo;

JACOB PANKEM, Esq., of New York City, Counsel for Defendants, Pierce and Zeilman.

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Mr. Mohr: We wish to take an exception to your overruling of our demurrer and a separate exception to the order overruling the demurrer as to each count.

Granted.

We also wish to take an exception to the order of the court denying a bill of particulars. 202

Granted.

We wish also to take an exception to the order of the court denying us a list of the witnesses.

Granted.

Mr. Mohr: The indictment consists of six counts. On the first two counts the defendants are not entitled to separate trials, but on the rest of the counts we ask separate trials. 203

The Court: Each count charges each and every of the defendants with a crime and offense therein specified and charges that each and all of the crimes were committed about the same time. It was not a separate and distinct matter at all; if separate and distinct from another, separate trials would be proper and required but as I understand the indictment and the charges I deny the motion to sever and grant separate trials on counts 3, 4, 5 and 6. 204

Exceptions to Mr. Mohr for Defendants.

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November 14, 1917, 10 a. m.

Trial of defendants moved by Mr. Lucey.

Jury sworn.

Preliminary motion by Mr. Talañerro:

If your Honor please, the indictment has six counts and the first two of these indict-
206 ments charge conspiracy and the four last counts charge a crime direct. I have never known whether a conspiracy under the Federal statute is a misdemeanor or a felony. Once in my practice it became an important matter, and it was never ascertained during that trial. The violation of some of these means a punishment with not more than twenty years and a fine of not more than ten thou-
207 sand dollars, and the other—that is the espionage charge, which is undoubtedly a felony, a violation of the Selective Draft Act is punished with an imprisonment of not more than one year, and some of the other statutes that are mentioned in the indictment are punished with a fine of $2,000 or two years, so that it seems to me it might be a question of
208 difficulty and at the same time very injurious to the defendants to have a general verdict rendered upon all the counts of the indictment and for that reason I may mention here also that the Espionage Act is spoken of all through this indictment as being approved June the 16th, 1917. As a matter of fact that Act was approved June the 15th. I move.

your Honor, that the Government select, elect, whether it shall proceed to trial upon the four last counts of the indictment or the two first counts. 209

Mr. Lucey: Of course the Government is unwilling to do that. The facts as set forth in the indictment clearly show that one set of circumstances, one set of transactions underlies the whole charge. The counts are simply the different laws alleged to have been violated. There is no multiplicity of events or multiplicity of transactions which can in any way confuse. It seems to me the way to handle the indictment is leaving the jury to find which of the counts should— 210

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The Court: I will see what the evidence is. We may eliminate some of these counts. Deny motion. Give you an exception.

Mr. Talafierro: The first count of the indictment charging a conspiracy to interfere with, prevent, hinder and delay the execution of certain laws of the United States, to wit, —and it names setting them out by numbers, commencing one, two, three, and on up to seven, the different laws that are violated, naming several statutes in the sub-section No. 7. Among these statues alleged to be violated is the Espionage Law of June 15, 1917, the Conscription or Selective Draft Act of May 18, 1917. I submit to your Honor that there 212

213 are fifteen statutes alleged to be violated, some of them are felonies and some of them are misdemeanors. I know the answer is that it is all one conspiracy, but one act of conspiracy, and does not become a crime until he violates a statute, and he has enumerated the statutes, having enumerated fifteen of them.

214 Take for instance the Espionage Act.

The Court: Then if they do any act to carry it into execution, the conspiracy is complete and the crime is complete, even if it be perfectly innocent.

Mr. Talafierro: I move, your Honor, to require the District Attorney to elect on the

215 first count of the indictment under which one of the numbered paragraphs he places the defendants on trial.

Objected to by Mr. Lucey. You can conspire to do a greater or a smaller number of things, violate a greater or smaller number of laws if the conspiracy turns out to be a conspiracy to violate any of those laws, the con-

216 spiracy is made out. We object to being obliged to single out which of these are violated. It is a conspiracy to violate.

The Court: That would limit the proof. If they conspired to do something else, for instance to steal a man's horse, why that would not be within this indictment and it would

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fall. Now they have charged some kind of action and very particularly conspiracy. In fact, you seem to be asking me to limit them as to the offense which they conspired to commit and that would limit them in their proof, and they could not prove what defendants actually did. I think it would be admissable. After I have heard the evidence will determine what the conspiracy was. For the present deny motion and give you an exception. If the conspiracy embraces the commission of several acts, each of which is a crime, they have the right to prove the actual conspiracy. That is what I intend to rule.

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Testimony.

WALTER MAGEE, sworn as a witness for the government and examined by Mr. Lucey, testified as follows:

I reside in Syracuse. I represent the 35th New York District in Congress. The district embraces the counties of Onondaga and Cortland.

I have served in Congress since March 4, 1915. I attended the extra session which convened April 2d, 1917. It was held in the hall of the House of Representatives.

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The President delivered a message upon that occasion. The President was there and members of the House who desired to attend and members of the United States Senate, and as I recall Chief Justice White of the United States Supreme Court

221

was present and I think some of the associate judges as well as members of the Cabinet, and the galleries were filled with guests.

The meeting was for the purpose of hearing a message from the President of the United States, Woodrow Wilson. He read a message to the joint session of the House and Senate. I heard it and
222 am familiar with its contents. It was published in the Congressional Record, with which I am familiar, as every member is. The record of Monday, April 2, 1917, which you show me contains a copy of the message delivered to us, both Houses of Congress jointly assembled April 2, 1917, by President Wilson. It is correctly printed therein.

The portion of Record containing the Presi-
223 dent's speech offered in evidence by Mr. Lucey.

The Court: For the purpose of showing what he said. Mr. Magee, Speaker Clark was in the chair, Congress was convened for the special purpose on that occasion of hearing the speech.

Congressional Record of Monday, April 2,
224 1917, volume 5500, No. 1, commencing on page 2 and ending on page 4, headed, "Address by the President of the United States." Portion admitted in evidence beginning second column of page 2, and ends with the words: "God helping her she can do no more," page 4.

Marked Exhibit A.

Walter Magee, Sworn

225

I cannot testify as to the resolution introduced in the Senate, I think that a resolution was introduced.

The Record contains all the proceedings of the House on that day.

A resolution was introduced in the House and in the Senate also. It was referred to the committee on Foreign Relations. It came back, as I 226
recall, we went into session about 11 o'clock a. m. on April 5th, which was Thursday and we continued continuously in session until about 2 or 2:25 a. m. on Friday when the resolution was passed by the House—April 6th.

Witness shown paper. I know the proceedings of the House in which I have a part—That is a 227
copy of the resolution adopted by the House about 2 a. m.

Conceded by defense that the identical resolution was passed by both Houses.

Certified copy of the Joint Resolution declaring war between the United States and the Imperial German Government offered in evidence and marked Exhibit B. 228

The act known as the Espionage Law passed June 15th, 1917, certified copy of what is known as the Espionage Law (H. R. 291, Pub. No. 24) being an act to punish "acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage the better to

237

impressed me in what I heard him talk was that he was in favor of the volunteer system. The Record will state what he said, I do not recall the Speaker talking on the constitutional ground. He was in favor of the volunteer system.

I don't recall the Speaker saying anything as to the unconstitutionality of the act. The discus-
238 sion was principally on the merits of the selective draft and volunteer system.

To Mr. Mohr: As I recall the declaration of war was not unanimous, there were almost fifty votes cast against it. There was some debate on it.

President's message to Congress of April 2d, 1917, read by Mr. Cregg to the jury.

239

EDWARD F. SMITH, sworn for the government.

Direct Examination by Mr. Lucey:

I live at 143 North Boulevard, Albany, N. Y. I am and have been journey-man painter for the
240 last five or six years. I belong to the Woodmen of the World, Delta Phi Sigma of Albany, and the Socialist Party. I hold an office.

The Socialist party is organized in locals throughout the country. The locals meet in regularly designated meeting places, meeting at regular times. There are two branches in the Albany local, both meet at 37 South Pearl Street in the

241

same room. I am secretary of the Socialist party local in Albany. The other branch is the Jewish branch. We hold separate meetings but work together. The branch for which I am secretary meets on the 2d and 4th Wednesdays. Their meetings are conducted like an organized society. Our officers are chairman, secretary and financial secretary.

242

I remember of being at the meeting of the 11th of July. I had attended meetings previous to that. I remember of having seen some printed pamphlets in the lodge room previous to July 11th, I saw some in June.

One of the kinds of work which the local does is to distribute pamphlets. Our branch prints pamphlets during a municipal campaign only.

243

We draw up our own platform and have these printed.

The National office prints those that are not for special local work. We receive sample copies of pamphlets which it has on hand. We buy as we need them.

Witness shown pamphlet marked for identification.

244

> Pamphlet headed "The Price We Pay," and consists of a double sheet, four pages, two columns to the page.

I have seen that pamphlet before in our lodge room, July 11th, 1917. That was the first time. There were about three copies, sent as samples I

245

believe, from the National office. Some members had it and the pamphlet was discussed. I don't know as the whole pamphlet was discussed, I don't know as the whole pamphlet was read, I don't recollect the whole pamphlet being read. I recall the reading of some parts of it, and the discussion.

246 There were about 18 or 20 members present. Some of the defendants were there. Mr. Pierce was there and I think Mr. Nelson was there. I am not sure about Creo. Mr. Zeilman was not, I would not state as to Mr. Nelson or Creo. The chairman of the meeting was Mr. James C. Sheehan, financial secretary, William Wensley. I do not keep a record of the names of those in attend-

247 ance.

We keep minutes of resolutions adopted, but not of those in attendance, the same as any other organization, meet and go about their business.

The pamphlet was discussed. It was contended that an account of the arrests in different places that they did not believe it would be wise at this time to distribute it and that we should not dis-

248 tribute it until the disposition of cases in court was brought about.

The Baltimore, Md., case was cited and a motion prevailed that the distribution of this literature should not be carried on until it was found that it was legal. Different ones advised against sending it out. Mr. Wendsley spoke against it. Others, I do not know just who they were. We

249

have one lawyer among our members, Mr. Lewis T. Hunt, one of the attorneys for the defendants. He was present and advised against sending it out.

My best recollection is that Pierce the defendant was there, Zeilman was not; that Creo was not and it occurs to me that Nelson was. I will not positively state that Creo or Nelson was not there. 250

The Court: I would not admit it at this stage as against Zeilman because the evidence now is that he was not there. I will leave it until further evidence as to Creo. As to Pierce, I admit it; as to Nelson I will admit it; of course subject to the finding that he was present. It is evidence against him if he was there; as to Creo if he was there, but not if he was not there. As to Zeilman the evidence is that he was not there. So at this time it could not be admitted as to him. I will take further evidence on the subject if it is offered. It is the discussion you are after now. This is at the time when he saw these copies there; it is on that July 11th meeting; three copies. 251 252

To the Jury: In a prosecution of this kind, gentlemen, where a conspiracy combination or agreement is charged that has to be first proven that there was such a combination agreement; that they were acting together. It may be proved in two or three ways, as I will

253 call attention later; but in proving a combination it is charged that four were in the combination, in the conspiracy. Now to prove that they were at this time, Mr. Lucey showed this meeting where they had three copies of this pamphlet, which he has had marked here Exhibit I, "The Price We Pay." Now re-
254 member on this evidence as it stands it may be evidence against Nelson and it may not be, depending how you find. It is no evidence now. It depends on all the evidence when you hear it. I admit against two, not the others. Of course it may come in later. Keep that in mind.

Except to the admission of testimony on
255 discussion at meeting as it applies to Mr. Nelson and Mr. Creo.

The Court: It depends on the evidence. If the evidence should establish finally that they were there then it should be considered against them.

Mr. Lewis T. Hunt, whom I designated as one
256 of the counsel is a member. We have no local adviser. He does not advise any more than any other member. He has the same privilege as the others in stating his position and opinion on that particular point. We are not all lawyers—Mr. Hunt is. I can't state the mind of others as to whether more attention is paid to Mr. Hunt on matters of law than any other member. I would

257 accept Mr. Hunt's word on a particular thing as being the right expression of law. On this occasion, the 11th, Mr. Hunt advised against the distribution of that pamphlet.

He stated that we should not distribute this literature at the present time; that there was a case in Baltimore pending and that if these fellows, 258 those men in Baltimore are acquitted, then we can decide; that at the present time they had been arrested and the government would contend that it is not legal; if they are acquitted they will contend that it is legal. Those are not the exact words but the substance and remarks along that line. I don't remember anything like "Don't send those out boys unless you want to be martyrs." I will 259 not swear to that he did not say that in substance or effect. He did advise against sending it out. There were others who wanted to. I don't know that Pierce had a copy in his hands. He took part in the discussion. He is an active member, he volunteers always to distribute literature.

Creo takes part in the proceedings and discussion when he is present.

260 Nelson is not a very active member but takes part when he is present. He never volunteered to distribute literature until this year. He did not volunteer July 11th, nor on any other occasion to my recollection.

Mr. Zeilman is a man who has taken part in the distribution of pamphlets. He can be counted on. I know he was not present.

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There was a vote taken as to whether this pamphlet should be distributed. I don't know just what the vote was, but it was decided that the pamphlet should not be distributed until such time as it should be found whether it was lawful. It was against sending it out.

262 I am the secretary of the local and carry on it's correspondence. I don't know what was done after this meeting with reference to procuring copies of this pamphlet.

A man by the name of Crandall generally takes care of procuring pamphlets but there was another literature committee appointed to act as a literature committee instead of having a literature agency.

263 I think a man by the name of Goldwitz and a man by the name of Arland was appointed as a committee of two to act with Mr. Wensley on the literature committee. Their duties were to get any literature which they believed to be proper to distribute and bring that before the local, and then the local to either to approve of the literature or turn it down.

264 There was no more business done at that meeting with reference to the pamphlet. I have told you all that I know that was said in discussing it.

I do not know when the committee got to work. There were some pamphlets procured about July 25th, I think; that was the next meeting. There were no pamphlets there that night. That was the regular meeting night. I do not say there was

an additional supply of this pamphlet at that meeting. It was discussed. 265

As to the defendants at that time Mr. Pierce was present. I do not believe the others were. I know Mr. Zeilman was not and I do not think Mr. Creo was, and I could not state about Mr. Nelson.

That was quite a particular meeting. It was just 32 days preceding the arrest of these men. I mean to say at the time these men were arrested I did not know whether they had been at this meeting or not. I can only positively state the presence of Mr. Pierce. I have no recollection at all about Creo on that occasion, nor of Nelson. I know that Zeilman was not there. He has not been to meeting for two years. I have a recollection that he was not there. I can't recall Nelson's presence. I can't say for a fact he was not there. He says he wasn't there, I don't know whether he was or not. 266 267

I talked with you in the District Attorney's office yesterday. I said I did not know whether he was there or not. I did not tell you yesterday in the District Attorney's office that on July 25th, Nelson was one of the men who volunteered to distribute. 268

I didn't tell you that Creo was one of the men walked up and volunteered July 25th. I said that I would volunteer and that Zeilman could be counted upon. I stated that Pierce volunteered. I didn't state that the others volunteered. I do not now want to say that I haven't talked with Creo

269

at all whether he was there. I have talked with Nelson—not with his counsel. I told his counsel that I told you Pierce was there. That Zeilman was not there, I didn't think that Creo was there and I didn't know about Nelson. I will not swear that Nelson was not there. I will not swear that Creo did not volunteer on that occasion, or Nel-
270 son. They may have done it.

Mr. Hunt: They did volunteer some time after this meeting; probably after this meeting.

Mr. Lucey: Were you there at the meeting of July 25?

A. I was not.

271 Q. How do you know whether they volunteered?

Mr. Panken: If Mr. Lucey wants to cross-examine me.

Q. At the meeting of July 25th, Mr. Hunt was not there, was he?

Mr. Talafierro: This witness was summon-
272 ed by the District Attorney. He has not shown but that he was a willing witness.

Mr. Lucey: I object with reference to this witness. The witness has not asked for any suggestion.

Mr. Talafierro: I object to your leading the witness. I object if the Court please, to

273

any cross-examination as wholly unjust as to whether or not they were there.

The Court: There was a meeting on the subject as to whether these pamphlets were purchased July 11, and for certain reasons they were not then to be distributed. On the 25th, was another meeting, and as I understand him the question of the pamphlets was 274
up, but whether any of them were there—the witness in substance stated at first they were, but later on as I understand that they were not there. I assume Mr. Lucey is trying to show that some action was taken there that night about these pamphlets. In fact the witness says there was, as I remember it. Mr. Lucey is trying to get him to say who was 275
there on the night of July 25th. Is that right Mr. Lucey?

Mr. Lucey: That is it, sir.

The Court: He has asked this witness; witness seemed to be a little uncertain about it. He is a member of this society; he is secretary. The government has called him. They are all members of this same society. They 276
all had a part in it, and the witness may have, probably does have some interest, and whether or not it will affect his testimony to tell openly, fully and frankly; it is for that reason that I permit Mr. Lucey to conduct an examination which is more or less in the nature of a cross examination.

Edward F. Smith, Sworn

277

Mr. Mohr: This witness if he is a participant in the agreement need not testify at all. He has testified over and over again. Mr. Lucey insists on his saying "no" when he says "yes." There ought to be a limit to that insistence.

278 The Court: The Court has got to be pretty liberal about it. He may remember and he may not, I won't allow any improper examination.

Witness: In that meeting the pamphlet "The Price We Pay" was up for discussion. It was not read over. The copies we had were around in the hands of the members. The contents were not talked about at that meeting. They did talk about 279 it. They confined their remarks to the decision of Judge Rose; that the government had shown that it was legal. There was a motion passed to call for distributors. I volunteered, Mr. Pierce volunteered and some others volunteered. The reason I know that Mr. Pierce volunteered; he walked up home after the meeting. He said he was going to distribute and I said so was I. Others volun- 280 teered but I don't know who they were. There wasn't anything said about the other defendants except Mr. Zeilman; some one said he always had and I corroborated it.

Mr. Lewis T. Hunt was not at the meeting of July 25th. The resolution of the previous meeting was rescinded without consulting Mr. Hunt at all.

281

There were about three pamphlets at the meeting of July 25th. I do not know when it was that more were purchased. I did not see more there. I never saw more than the three. We ordered them from the National office. Whoever it was left to, ordered them which was to the members of the literature committee. I guess they ordered more pamphlets because they were distributed. I did 282
not see them before distribution. They landed in some of the members' houses. The principal office is 37 South Pearl Street. The National organization is in Chicago, Ill. The pamphlets were printed there. All the literature is not necessarily printed by the party but it has the endorsement of the party, and the National office sends out the endorsement, and then we purchase it through the 283
National office.

It has not a printing office of it's own there in Chicago, but I understand that the printing is done there.

I do not know to which member's house this supply came. I think there was some talk then as to whether they would order them right away. I don't know who said it or what was said about 284
ordering them. That was left to this literature committee. I remember nothing that was said only that we ought to get busy on the circulation. The action was not unanimous. There were still some who voted against sending it out. A small number I think.

As to the distributers if they were not notified

285

by the literature committee by mail, they would be notified at the next meeting—that is the general rule.

I think a motion was made by someone that we get "The Price We pay" and that we order five thousand. They were paid for if they were ordered. Payment for them is in the hands of the
286 treasurer of the literature committee and the treasury is in the hands of the financial secretary. I simply get an account of what the literature agency spends and the like of that. The expense of these pamphlets is not in here. I showed you an item of expense but it does not say what for.

After the meeting of July 25th, I saw some of the pamphlets but not any bundle. I saw only the
287 three which I had seen before. Our next meeting was August 8th. I have no information as to when the 5,000 pamphlets arrived nor the house to which they were delivered. The distributors got them from Mr. Pierce. I do not know where he got them. Pierce did not tell me what he did with them, nor did Creo, Nelson or Zeilman.

I was at home all day August 26th. I might
288 have taken a walk around the park.

The pamphlet Exhibit 1 is the one which was voted to be distributed. It is the one I understand which was distributed.

Offered in evidence as Exhibit 1.

Mr. Talafierro: We will agree that that pamphlet is the exact pamphlet distributed by all of the former defendants subsequent to

289

the 25th of July, 1917, and on August 26th, and other pamphlets besides. But we do not concede a conspiracy.

Zeilman is a member of our body, was July 25th, and for a number of years and on August 26th. The same is true of all the defendants.

Cross Examined by Mr. Pankem:

290

I do not know Irwin St. John Tucker, have not read any of his other literature.

LOUIS B. LAWTON, sworn.

Direct Examination by Mr. Lucey:

291

I am a Major in the regular army. Have been 28 years in the service. I am a West Point graduate. Am now at present in Syracuse, assigned to recruiting work. I know the duties of a recruiting officer. I know the rules and regulations covering their duties. I have been a recruiting officer since July 5th, this year. I have known other recruiting officers. I know the work and the way they perform their duties.

292

Q. Is it true that a recruiting officer in this country for the United States army takes the sons of military age and impresses them into the army?

Objected to.

The Court: It seems to me that he may state the method.

293

Mr. Lucey: I prove the man is a soldier and that he knows the rules and regulations regarding the work of a recruiting officer and the duty of a recruiting officer. I find this statement:

"Into your homes the recruiting officers are coming and they will take your sons of
294 military age and impress them into the army."

I want to know if that word "impress" has any particular meaning.

That word impress, at least since the war 1812 has an undisputed meaning of it's own to anybody who has read our history. Now, what it means when it comes to putting men
295 into service; as to what the word "impress" means when it is used in connection with recruiting.

Mr. Mohr: I submit that it is not the proper evidence for the Government to prove the falsehood of a statement by getting somebody to say that it is not true. Let him tell what is true, and then let the jury determine either
296 the falsity or the truth.

The Court: The Major may tell what the statement means.

Mr. Talafierro: I object to the question as being immaterial, incompetent and irrelevant and calling for a conclusion.

The Court: Sustain the objection. He may

297

describe under the law and under the military regulations what authority the recruiting officer has. He may describe the method of recruiting and if the word "impress" in the military service has any different meaning than the dictionary meaning. He may tell what that is if it does have a different meaning in the recruiting service. I don't know 298 whether it has or not. It may have. It isn't for me to say.

Q. Major, will you go on and state the duties of a recruiting officer and how he performs them.

The Court: This is recruiting service, and simply tell how it is done, by what authority.

299

A. The recruiting is conducted by the Adjutant General's office under the Secretary of War. The country is divided into districts, averaging one million, sometimes more, sometimes less. There is a main office and several branches. For instance my district comprises Central New York, Ogdensburg to Geneva, Utica to Ithaca, and contains between—

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Objected to.

Mr. Talafierro: Are there any written forms?

A. Typewritten.

Q. Have you a copy of them with you? A. They are voluminous.

301

Mr. Talafierro: The best evidence is the rules and regulations, and then we can see what they are.

Witness: It will take you a week to read them. They are changing them every day.

Mr. Talafierro: You and I might differ. The
302 rules and regulations are reduced to typewriting and that being so the best evidence, because he and I might differ as to the construction of these rules.

Mr. Lucey: Isn't it possible that a man who who knows from actual experience and who is in the business and how it is being done can tell what the duties are and how they are per-
303 formed. This statement that we are meeting here does not go into rules and regulations at all. It goes to the actual work. It says "A recruiting officer will come and impress."

The Court: Why don't you ask if that word "impress' in the recruiting or military service of the United States has any special sig-
304 nificance or meaning different from the dictionary definition.

Q. Major, is the word "impress" used in the recruiting service?

Objected to, that it does not appear that he is competent to pass on it.

The Court: He has been in the regular army

25 years, a graduate from West Point and he is now engaged in recruiting service, and of course has been familiar with it. 305

A. No.

Q. Has the word "impress" or the act of impressing any place in the recruiting service? A. None. 306

Q. Have these words any place in the recruiting service, "And still the recruiting officers will come, seizing age after age." Has the word "seizing" any place in recruiting? A. No.

Q. Recruiting has to do with the volunteer service? A. Yes.

Q. Nothing to do with the drafting system? A. No. 307

Q. "You are to be dragged, whipped, lashed, hurled into it."

Objected to as being wholly irrelevant, immaterial and incompetent.

Q. Is there any rule authorizing recruiting officers to lash, whip? A. No.

Q. So far as you know is that being done? A. No. 308

Objected to.

Q. Is there any branch of the service that you have any knowledge where anybody is being dragged, whipped, lashed or hurled into it? A. No.

Louis B. Lawton, Sworn

309

To Mr. Talafierro:

Q. You know that the Conscriptive Act is sometimes called the Forcible Draft? A. All drafts are forcible.

Q. The effect of the Conscriptive Act of May 18, 1917, is to force a man of a certain age to go into the army whether he wishes to or not?

310

Mr. Lucey: Objected to. A question of law. The act is the best evidence of what it authorizes and compels and we have introduced that in evidence.

The Court: I don't know whether Major Lawton has studied law. Gentlemen: Under this Selective Draft Act those between

311

certain ages are put on a list; the names are drawn out of a box, and then they are put on a list; then there are certain exemptions, certain persons that come under the exemption. For instance the President of the United States is not subject to draft, or the Secretary of War. If they come within the age and are not exempt then of course they are drawn. Selected they come forward or report, and

312

then they are examined to see whether they are physically and mentally qualified. Now if they are not exempt and if they are finally accepted and qualify and are not exempt, either by law or under these rules or by the boards then they are in military service by the very fact that they are enrolled and then it is their duty to go.

313

Now that is the mode; that is the way they get into the service under the Selecive Draft.

Mr. Talafierro: On your statement I am thoroughly satisfied.

The Court: I didn't state it in detail.

Cross-examined by Mr. Mohr: 314

Q. The designation of the officer to whom the drafted men report on call? A. They report before a civil board. I have nothing to do with it. Then according to their locality they report to a commanding colonel of the regiment to which they are assigned.

To Mr. Panken: 315

Q. After a number of young men have volunteered and have been accepted by their recruiting service and are fully established in the army, and then go back to their homes and remain there, what would happen when the regiment is called to march away?

Objected to as irrelevant. 316

Mr. Lucey: I am going to ask that this cross exaination should be carried on by one attorney.

The Court: Under this Conscription Law—here is the proposition. See if there is any objection. If there is I will withdraw it. When these civil boards, military boards, do

317

the examining, when the person selected under the selective draft law, when they are finally certified as accepted, when that is finally done, then if they should not report on receiving notice that they have been finally accepted as qualified for military service, if they do not report, why then isn't it provid-

318 ed that they can be arrested?

A. Not by a recruiting officer. The civil authorities, and turned over by the military officers. They are not taken over by the military officers. They are turned over to the military officers.

Mr. Lucey: We can't disagree about that.

319

FRANK J. CREGG, sworn.

Direct Examination by Mr. Lucey:

I reside in Syracuse, am a lawyer. Also ass't ant United States District Attorney, for the Northern District of New York. Have been for two years. I am acquainted with the criminal laws

320 of the United States. There is no Federal Law making it a crime for a man not to stand up when the "Star Spangled Banner" is played. The Food Conservation Law was approved August 10th, 1917.

Section 771 of the revised Statutes read by Mr. Lucey.

In performing my duties in the office of Dis-

321

trict Attorney, I have had no notice or knowledge of anyone being prosecuted for not standing up when the "Star Spangled Banner" is played.

Cross Examined by Mr. Mohr:

The District Attorneys of the United States are part of the Department of Justice of which the Attorney General is the head. 322

Our department here has not prosecuted any food gamblers. We have no notice of any violations.

JOHN TOOHEY, sworn. 323

Direct Examination by Mr. Lucey:

I reside in Albany, am a police officer of that city, since July 1, 1917. I was on duty August 26th. Saw some of the defendants that day.

I was going to breakfast about twenty minutes to six, August 26. I saw Mr. Zeilman and Mr. Creo. They were going west on Central Avenue, and they each had a bundle of literature under their arm. I was in plain clothes, as they passed me Mr. Creo handed me one of the pamphlets, "The Price We Pay."—Exhibit I. I glanced over the head of it, and with that there were two gentlemen passing me, and I asked one of these gentlemen if he knew any of these fellows, and he said, "yes, I know who the short fellow is." And 324

325

then I went after Mr. Zeilman and Mr. Creo and I asked them what they were doing. Up to that time I did not know them personally. They and I were strangers. I learned their names when they were taken to Court. The gentleman I asked said "yes, I know the short one." He said he was a barber.

326 Q. Did he give you his name? A. I don't think he did.

Q. Go right ahead now. A. I hollered at Mr. Creo and Mr. Zeilman, and they didn't stop. So I ran after them a little ways, and I approached them, and I asked them what they were doing. They told me they were distributing literature
327 and they said they had a right to distribute this literature as they were citizens of the United States, and I didn't question them any further as to their right to distribute their literature. I told them they should be careful that hour of morning about waking people up. I proceeded to the station house and showed one of the pamphlets to the sergeant in charge and I asked his opinion of it and he sent Officer Bain and myself to bring
328 them to the station and Officer Bain and I proceeded from the station house and as we left the station house, we hailed a passing automobile and we rode up over the ground where I had seen Mr. Creo and Mr. Zeilman, and after we had rode about three blocks beyond where they were last seen we got off the automobile and we tried to find some trace of the pamphlets up around there. That

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was up around Watervliet Avenue and we couldn't see any up there so we came back east on Central Avenue, and as we got down to the Manning Boulevard, which is about three blocks below Watervliet Avenue we saw one of the bills, "The Price We Pay" under a doorstep of a shoemaker's shop. With that we followed the trail of the bills down Clinton Avenue as far as Ontario 330
Street.

We followed the trail of bills. We could see the bills as we went along on the door-steps.

The pamphlets were distributed at most every house. We went last on Clinton Avenue as far as Ontario Street and east down Elk Street where we followed the trail of the bills again down Elk Street, but on Ontario Street, Officer Bain left 331
me. I continued down Elk Street, I couldn't positively state what direction he went, I saw the bills on the door-steps down Elk Street, and as I got below Lake Avenue, I saw Officer Bain coming in an automobile, I jumped on the back of the automobile, and we continued down Elk Street to Robin Street, where I saw Mr. Creo coming down from the door-step of 425 Sheridan Avenue and 332
Mr. Zeilman was standing west of him. I told them they would have to go to the station house and they said "very well."

I did not know the names of the defendants, but I now identify the two men standing, called Creo and Zeilman, as the two men that I saw on the street that morning. Each had a package of

333

these bills distributing them in the doors. Bain was standing along side of me at the corner of Sheridan Avenue and Robin Street. Mr. Zeilman said to me, "There were two more gentlemen distributing and you may just as well get them all." and with that the other two passed down Clinton Avenue. Mr. Zeilman said, "There they go
334 now," with that Officer Bain got in the automobile again and he left me, and when Officer Bain came back, he had the other two gentlemen in the automobile. I identify the two who have arisen as the two men that Bain brought back. Zeilman and Creo got in the automobile and we proceeded to the station house with the four defendants.

There the sergeant in charge gave me a pam-
335 phlet which I took to Commissioner Mills. The same pamphlet that Creo gave me. First he read the pamphlet to Mr. Mills over the telephone, and Mr. Mills could not get the theory of the thing readily over the telephone, so I took one of the pamphlets to Mr. Mill's house. Mr. Mills is United States Commissioner. I found him at home and gave him the pamphlet I had from Creo. He
336 read the pamphlet and said all right, you go back and hold these four gentlemen, until such time as you hear from me, which we did.

Zeilman and Creo had at the time a bundle of pamphlets about seven or eight inches thick. So had Mr. Pierce and Mr. Nelson.

While we were at the station house we chatted with them in a friendly way, nothing in regard to the pamphlet.

John Toohey, Sworn

337 We took them down to Commissioner Mill's office at 1 p. m. on that Sunday, August 26th. There was a hearing had there. I think that Creo cited a decision of Judge Rose. They were given time to go out and send a few messages to their counsel.

They were held until they gave bail. They had counsel there at the hearing that Sunday. I 338 couldn't positively state all that went on at the hearing. The attorneys were given ten days in which to file briefs. After the hearing the men were kept in our charge, and we took them to the Albany County Penitentiary, and turned them over to the keeper there.

On the way there Mr. Creo and Mr. Zeilman with our permission stopped at their residence 339 and they both went into the house together as their home. I heard a conversation by the defendant with Mr. Pierce's wife. She said, "What is the matter." He said, "we have been arrested, we will get out of it all right, we will be out," and she said, "I told you not to peddle these bills, I told you you would get into trouble." I think Creo had stepped into an adjoining room. I then took 340 the men down stairs and over to the penitentiary, two of the defendants had stayed outside.

I am twenty-five years of age and I registered.

Cross Examined by Mr. Mohr:

When we took these defendants to the police station we did not make any charge against them.

341

When we took these defendants before Commissioner Mills, the Commissioner read the charge against the four. Officer Bain made it. We had had previous instructions about apprehending men distributing literature, from Lieutenant of Police, Prior. No instructions as to these particular men. His instructions were that if we saw
342 soap-box orators or those distributing literature that would be detrimental to the cause of the government to take them to the station.

When I got the pamphlet I glanced at it. I must have read it. I thought the paper came within my instructions. The lieutenant did not tell me anything about arresting members of the Socialist party. I did not know that these men were mem-
343 bers of any special party.

Well at that time I didn't know whether it was a pamphlet on Socialism. As I read the thing over I saw the different statements in the pamphlet. I couldn't swear it wasn't Socialism or whether it was Socialism. I did not know it was a pamphlet on Socialism at the time.

I remember the impression it made upon me as
344 I read it. I thought it was a pamphlet on Socialism.

I was in Albany when the war broke out. I was waiting to be appointed policeman. I was married Easter Monday of this year.

I am registered. I did not claim exemption. I await my call to duty. And am ready to respond and have been ever since I registered. Nothing has affected my opinion on that subject.

345

Re-Direct Examination by Mr. Lucey:

Previous to August 26th I had made no study of Socialism I knew nothing of their doctrine.

In reading a paper, from my knowledge of Socialism I could gain some idea if that paper was on Socialism. I think I could gain some idea as to whether it was a paper on Socialism or whether it was a paper circulated by Socialists. 346

Q. Let me call your attention to one paragraph in this paper (reading):

"Our entry into it (meaning the war) was determined by the certainty that if the Allies do not win, J. P. Morgan's loan to the Allies will be repudiated and those American investors who bit on his promises would be hooked." If that were true what impression would that make on you as to your willingness to enter the war? 347

Objected to as not relevant, immaterial, calling for a conclusion—

The Court: If it made any impression.

Exception.

The impression that it made on me at that time was that I would not care about entering the service if that was true. 348

Cross Examined by Mr. Panken:

I was a witness and testified before Commissioner Mills at length. Was examined by Assistant District Attorney Ford. I read the pamphlet

349 as it was handed to me August 26th. I don't say I read the whole pamphlet, I glanced it over.

I first saw Zeilman and Creo, it was on Central Avenue. As they walked along they handed me a pamphlet. At that time I read some of the front page. I read the last page on my way down to the station house.

350 To the best of my ability, I think I told Mr. Ford, I read a few lines and shouted at the two gentlemen; they didn't hear me, so I ran a little ways after them and said, to the two gentlemen—"What are you peddling this literature at this hour of the morning for: Ans. We have a right to peddle this literature as we are citizens of the United States—I said—Be careful about waking

351 people up at this time and went on my way."

I think the hearing was about September 16. My recollection is as good now as then as to what happened.

I said in answering Mr. Lucey that I got the impression after reading the pamphlet that I shouldn't want to go into the service. When I was examined before Mr. Mills I had read the whole

352 of it.

I remember you asking me then if I would obey the law and I answered "yes," if the record shows it. I am a police officer. I am willing to obey the laws as laid down by the government. I wouldn't violate the law.

John C. Bain, Sworn

353

Re-Direct Examination by Mr. Lucey:

The impression that was made on me when I read the section "The Attorney General of the United States is so busy sending to prison men who do not stand up when the "'Star Spangled Banner" is played, that he has no time to protect the food supply from gamblers" was that it was 354
not right, that it was false.

Re-Cross Examination by Mr. Panken:

I did not read of prosecution of men because they did not stand up when the "Star Spangled Banner" was played. Nor I never heard the name of Assistant District Attorney Harold C. Content of New York City. 355

JOHN C. BAIN, sworn.

Direct Examination by Mr. Lucey:

I reside at 119 Sheridan Avenue, Albany N. Y. I am a police officer. Have been 19 1-2 years. I 356
was on duty on the morning of August 26th last.

Officer Toohey came to the station house. I was in reserve. My attention was called to some people distributing pamphlets by his bringing one in, and we read it over.

It was a quarter to six. After reading the pamphlet the Sergeant said, "You better go out with

357 Toohey and see who is distributing pamphlets." We went out and we got to Quail Street, there was an automobile coming up. We jumped on the running board and rode to Watervliet Avenue. Toohey went to follow the trail of the pamphlets and I proceeded down east along Central Avenue from the Manning Boulevard. We went across Ontario
358 to Elk Street. Toohey and I parted, Toohey went east on Elk Street, and I going south on Ontario Street. When I got near Central Avenue an automobile belong to Allen & Arning came along and I held up the chauffeur and said I wanted to put it in service. He said, "All right." "We are trying to catch some fellows who are distributing pamphlets."

359 Q. As you traveled along did you see these pamphlets on the door steps? A. Yes. In order that we be sure to surround the fellows we came over north on Ontario Street to Sherman, then I went east along Lake Avenue to Elk Street where just below the corner of Elk Street and Lake Avenue we picked up Toohey in the automobile. We proceeded along Elk Street until we
360 came to Robin Street, and on the corner of Sheridan Avenue and Elk, within about 25 feet (Sheridan comes up here to the corner over from Elk Street) on the corner stood Mr. Zeilman. Mr. Creo was coming down from the stoop of 425 Sheridan Avenue. We approached and we said, "What have you got?" Mr. Zeilman presented me with a pamphlet and said, "We have a pam-

361

phlet. We have a right to distribute them." He said, "You might as well get the whole of us. The other two are on the other street." Mr. Toohey stayed with Mr. Zeilman and Mr. Creo and I continued over where Mr. Nelson and Mr. Pierce were distributing. Between the numbers 498 and 510 we watched them going up and down steps, while the automobile was approaching. We watched 362
them as they came down. We brought Mr. Pierce and Mr. Nelson in the automobile and joined Mr. Toohey with Mr. Creo and Mr. Zeilman. We proceeded to the station house and had a talk with them. We sat them in the back room until we got in communication with United States Commissioner Mills. I saw "The Price We Pay" in the morning, but I didn't read the pamphlet that 363
Zeilman gave me until I got to the station house. I received two pamphlets, "The Price We Pay" and Protect Your Rights." I won't swear to the pamphlet Mr. Zeilman gave me. He presented me with a pamphlet on the corner. He said, "Here we are distributing these pamphlets."

Witness shown Exhibit I.

364

That is a copy of the pamphlet. It is the one presented if it is the one marked by the United States Commissioner. I took the pamphlet and put it in evidence down there. It is the pamphlet. I saw another at the station. The men had pamphlets, each man had a package and they laid them in the station house when they came in.

365

These two were marked A and B and left with Commissioner Mills.

Cross Examined by Mr. Panken:

The first man I saw was Mr. Zeilman and then I saw Creo. I then talked with Zeilman. Zeilman told me there were two other men distributing
366 literature. I didn't see them when he told me. They were on a different street. He directed me to where they were.

I got in the automobile on Ontario Street, about 25 feet north of Central Avenue. I traveled about five blocks before I saw Zeilman. I didn't pick Toohey up until I got on Quail Street below Lake Avenue. Toohey and myself traveled a block be-
367 fore we saw Zeilman. I saw the pamphlets on the doorsteps. There was no concealing of the pamphlets. Both Toohey and I talked with Zeilman. Zeilman handed me two pamphlets. I was in uniform. I got "The Price We Pay" and "Protect Your Rights."

Mr. Panken: I call upon the government to produce that pamphlet "Protect Your
368 Rights."

Mr. Cregg: You have one in your hand.

Mr. Panken: Will you look at it Mr. Lucey?

Mr. Lucey: If your Honor please, that pamphlet does not figure enough so that there is any indictment on that pamphlet at all. I

369

think they said they did not know that pamphlet was in the papers. It seems that some of those were found folded in with the others. The defendants claimed at that time, as I understand it that they did know it was in the papers distributed.

Mr. Panken: If another circular was distributed and one of the officers got the circular we are entitled to get that circular. 370

The Court: The ones attached here are "The Price We Pay."

Witness: I have seen a paper similar to the one you show me.

Marked Defendant's Exhibit 1 for identification. 371

Witness: When we brought these men to Fifth Precinct, we found they had bundles of literature. In it there were 16 copies of "Protect Your Rights"—folded right between the pages.

The Exhibit 1 you show me is a copy that looks similar to the one that I had that I presented to the Commissioner. 372

I remember the leaflet was headed "Protect Your Rights" and that it was written by Ralph Cornwall—I knew it was published in Chicago.

Direct Examination by Mr. Lucey:

When we came back from Commissioner Mill's office we discovered the pamphlets, "Protect

373 Your Rights." But I knew when Mr. Zeilman gave me the pamphlet.

We found sixteen on the radiator and we remembered Creo put them there. There were none in the other packages. This was brought out in the Commissioner's office when Zeilman was there.

374 Zeilman didn't say anything about that, personally he said, "This is what we are distributing." He said that to me on the street. I didn't have anything more to do until I got to the court, when I got to the court, the defense refused to submit the evidence of the prisoners.

When Mr. Zeilman handed me the pamphlet, that single leaf "Protect Your Rights." I found
375 folded inside "The Price We Pay." It wasn't in sight until I unfolded the pamphlet at the Police Station. The defendants were present. I don't remember that they said anything at the time.

The pamphlet "Protect Your Rights" was brought out before Commissioner Mills.

Creo left the bundle containing sixteen of these leaflets on the radiator. The bundle was two and
376 a half inches thick.

There were some pamphlets in which "Protect Your Rights" were not folded. I looked in the other bundle and found none.

At Commissioner Mill's office the defendants said that it was placed there unbeknown to them.

Mr. Creo, I can remember now, said that they didn't know it was there. That was in the press-

377

ence of them all. They came to an agreement that the pamphlet wasn't there. Creo said, "We did not know that they were placed in the pamphlet."

Defendant's Exhibit 1, "Protect Your Rights" offered in evidence. Received as a thing that one of the defendants, Mr. Zeilman had. 378

Re-Cross Examination by Mr. Panken:

I said to you that I didn't remember that the defendants said anything about this pamphlet at the general hearing. At the arraignment I know they did.

I have seen literature distributed before on the doorsteps and picked it up. I won't say in the morning, but I saw them distribute literature before. 379

After the arrest I brought all the defendants to the station. I don't exactly remember the talk I had with them.

I remember Mr. Pierce showing me a clipping with reference to the Baltimore case. That it was a decision of Judge Rose, Federal Court Judge of Baltimore, was in the clipping. I didn't read it. The Sergeant did. 380

To the Court:

Mr. Pierce had the clipping and he showed it at the desk at the Fifth Avenue Precinct. He didn't show it to me. While he was there he pre-

381 sented it and said that it was the decision of the Judge in Baltimore.

I didn't say on the 26th of August in the Police Station in the presence of the defendant that the leaflet, "The Price We Pay" was an advertisement to subscribe to the American Socialist.

Before Commissioner Mills with these four de-
382 fendants, I didn't say and point it out to the Commissioner that on the back of this leaflet, "The Price We Pay" now in evidence that there is an advertisement to subscribe for the American Socialist at so much per year, and per month, and that it had the Union label and was a perfectly legal leaflet—I think Mr. Mills said something about the newspaper end of it.

383 I didn't say to the Commissioner there was nothing to this charge.

We brought them because they distributed literature around our place. The Commissioner ordered that they be brought before him.

To Mr. Lucey:

Q. Are you acquainted with the nationality of the people who live around this district where the
384 literature was distributed?

Objected to.

The Court: He may answer whether or not he is.

A. Yes, sir.

Objected to as incompetent, irrelevant and immaterial, and has not at all any bearing upon the issues in this case.

385

The Court:

Q. Was this anywhere near where the defendants live? A. Yes.

Q. Did the defendants or any of them live in that neighborhood where you say you knew the nationality of the people? A. Yes.

Q. Lived in that vicinity? A. Not that vicinity. 386

Overruled. Exception.

Q. What is it, German? A. German.

MR. TOOHEY, recalled.

387

Direct Examination to Mr. Lucey:

The first recollection I have of the pamphlet—"Protect Your Rights" being discovered was in the Commissioner's office.

I think the Commissioner discovered it himself and the Commissioner said to me, "Is there any more of these in these copies"? And I started to look through the copies, the bundles as they 388 laid there and Mr. Zeilman said that he had one there that he had taken out of the leaflet that was in the inside, and that if there were any in there, he didn't have any knowledge of it. He said he went through them the night before.

I don't remember hearing the others tell their experiences.

389

I searched through the pamphlets on the desk, for the leafllet, "Protect Your Rights." I took and opened them up and looked through them to see if I could find any of this leafllet. The Commissioner said if I could any he would like to have them. We might have found one or two in those in the office. We left them there. When
390 we came to the police station, we found sixteen on the radiator, which the Captain sent to the Commissioner. That was all there.

Cross Examined by Mr. Panken:

I think both pamphlets were produced before Commissioner Mills.

391

MERWIN J. BROUGHAM, sworn.

Direct Examination to Mr. Lucey:

I reside at 726 Clinton avenue, Albany New York. I was at home on the morning of the 26th.
392 I went out about noon time. I first saw the pamphlet "The Price We Pay" in the morning when I got up. It was on the dining room table. Some member of the family had gone out before I did. I just started to read the first few lines- I read the part where it said "Conscription was upon us" and the first statement about the bringing in of the recruiting officers into the homes and

393

dragging the members of the homes to these stations.

I am 29 years old, I registered June 5th, 1917.

Cross Examined by Mr. Panken:

I was born just outside of Albany. My parents were born in the United States. My people were originally English. 394

I read the first two paragraph. I was a witness before Commissioner Mills.

I believe Mr. Ford on that examination put the question— "What did you do when you saw this in the house,?" that my answer was "I saw it laying on the table, picked it up and saw "The Price We Pay" and I read the headline, that conscription was upon us, and I paid no more attention to it." 395

I was examined in the draft and was exempted.

I was examined on the 22d of August and was rejected.

Re-Direct Examination by Mr. Lucey:

I didn't claim exemption—was under weight according to height. 396

397

FRED E. PFIEFFER, sworn.

Direct Examination to Mr. Lucey:

I reside at 687 State Street in the City of Albany. Have lived there since September 4th, in August I was living at 170 Quail Street. I lived about five blocks from where these pamphlets
398 were distributed.

I saw the pamphlet "The Price We Pay" August 26th . I came on Ontario Street, and went down Central Avenue, about the middle of the block I picked up one off the sidewalk, and I looked at the heading of it and read that conscription is upon us, the draft is here, and where the military officer is coming into your home and then
399 I tore it up and threw it away.

I am of draft age—have a brother in the Tenth United States Engineers. I saw the defendants that morning on Central Avenue. They were handing out pamphlets "The Price We Pay." There was nothing wrapped into the pamphlet I picked up. I met Officer Toohey coming up the avenue, and he started to run after them, and
400 when we got above Ontario street they were still distributing.

Cross Examined by Mr. Panken:

The following morning I learned the defendants were arrested. I was not a witness, before Mr. Mills. I knew Officer Toohey since he was appointed in the police force. I knew Officer

Fred La Grange, Sworn

401

Bain. Officer Toohey saw me pick up the circular. I talked with him that morning. I was born in the United States.

Re-Direct Examination to Mr. Lucey:

I am German-American.

402

FRED La GRANGE, sworn.

Direct Examination to Mr. Lucey:

I reside at 502 Clinton Avenue, Albany. I was at home on the morning of August 26th last. I did not see any of these defendants on that morning. I saw the pamphlet "The Price We Pay." 403
I picked it up from the doorway of my home, the first time I went out that morning.

I read it over. I threw it to one side. I have a boy of draft age. He is registered.

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405

JOHN J. SCULLY, sworn.

Direct Examination to Mr. Cregg:

I reside at No. 937 Third Street, Rensselaer—Rensselaer is across the river from Albany. I am a reporter. Have been engaged in that three years. Am 22 years old.

406 I have registered under the conscription act. I know all these defendants now by sight. I know defendant Pierce. Have known him for almost two weeks before he was arrested.

I first saw him in Groelz Brother's saloon, corner of Fourth and Broad Streets, Albany. I had a conversation with him.

407 Q. When? A. About nine days before.

Object to any conversation.

Mr. Cregg: We ask for this only as against Mr. Pierce.

The Court: Anything that they said on this subject regarding the distribution of these pamphlets might have bearing on his intent and purpose in distributing the pamphlet. It

408 certainly is evidence about the defendant Pierce, if it has any relevancy at all; might have a bearing on his intent; may not have any relevancy.

Mr. Mohr: They should only prove the overt acts they set up.

The Court: I don't think that is the law.

409

I will receive this against the defendant Pierce and then see whether it can be received against either of the others later.

Exception asked on the ground that it is not set forth in the indictment. Exception.

This conversation was about the 16th of August. Three or four o'clock in the afternoon. John 410
Groelz, one of the proprietors and a man by the name of James Ryder and the defendant Pierce were there.

I am a member of the American Protective Association and I had been previously instructed by one of the members of the Department of Justice. He had instructed me to watch. I had volunteered to watch any place where there were German 411
people to find if there were seditious utterances or anything that might interfere with the operations of the government.

This is a German saloon. I sat down with the intent of finding out—of paying attention to what occurred.

My main purpose was to gather news first—This is what I did.

412

I mentioned a case. I commenced by criticising the draft. I told the story of a young Jew, whose mother lived in Russia. This young Jew had been refused exemption claimed on the ground that his mother lived in Russia and that he was not entitled to exemption; that the government had ruled that no man could claim exemption for supporting his parents who lived in the old country. I declared

413 that this is not right; that the government should make some proivsion for these men. It looked as if they were caring more for Belgians. They were sending them food and letting the mother of their American citizens die of starvation because they wanted him. Mr. Pierce spoke up and said, "Young man, do you know that you are commit-
414 ting treason?" I said something like this: "If it is my utterances are correct." At that point Mr. Pierce said: "Do you know I am connected with the draft?" "How are you connected with the draft?" "I am around getting photographs of the men that are drafted." And at this point he handed me a piece of literature, that is, "The Price We Pay." And I glanced at it and as we
415 walked along he said to me, "I could be arrested for treason if you were sucker enough to squeal." At that point he started to show me some photographs I glanced at the photographs and said, "I have been drafted. I would like to have my photograph taken." Those were not the exact words.

Exhibit I which you show me is a copy of the pamphlet Mr. Pierce handed me on that occasion.
416 With reference to that pamphlet Mr. Pierce said, "I could be arrested for treason for giving you this if you were sucker enough to squeal."

At this point, I spoke up and said I had been drafted and would like to have my picture taken. He said he had been employed by Gustave Lorey, a photographer, but preceding that,—may I go back?

Before he handed me this literature when he said he was connected with the draft he went on to tell how he visited the homes where he was taking these pictures and the suffering of the mothers who had their sons drafted and he mentioned one particular case. He said she would die if her son was taken from her, and at the point where I had mentioned my being drafted he referred me to Mr. Lorey and showed me the pictures, and I said the reason I am opposed to this draft is that I am Irish and I have no use for England and he said that I had good reasons to be opposed to England and he said something about some Irishman who had been put into prison and put against the wall and shot. He said I ought to give him credit for having my picture taken, and I asked him for his card and he gave it to me. On the card was written the name of Mr. Lorey and Clinton R. Pierce, representative, Clinton Avenue.

I took this pamphlet away with me. I saw Mr. Pierce the following day, I think, on Broadway near the post office. I stopped and talked with him. It was about noon. I talked about my picture. He asked me what I thought about the literature. I told him I had not yet consulted my mother about the picture and I wouldn't want my picture taken at that time.

I next saw him, at the hearing before Mr. Mills, the Monday following the day that he was arrested. All four defendants were present at that time.

John J. Scully, Sworn

421

Cross Examined by Mr. Panken:

The pictures I am talking about are photographs. I couldn't say they were photographs of men who were drafted into the army. He told me of some of them had been drafted. I don't know what they were going to do with them. I

422 did not know what Pierce was doing at that time until he told me. He told me he was drumming up trade for a photographer. He asked me to give him an order for a photograph. I had offered myself. I think I did that that I might want my photograph taken.

I'm a newspaper man. The Albany Journal and Albany Argus. A morning and evening paper, not published by the same company. I work

423 on a salary in both places.

Mr. Pierce was seated by himself at the table. Groelz and Ryder were there then when I had this conversation—I started it. Neither Groelz or Ryder are in Court that I know of. I told the District Attorney that Groelz and Ryder were there when I had this conversation. I imagine they are in Albany.

424 I told the pitiful story about some women in Russia. I addressed Groelz and Ryder. I don't recall that they made any remarks. Mr. Pierce spoke up and said, "Young man do you know that you are committing treason. I told them that if I were my utterances were correct.

The story that I told him was true. I do not believe it was wrong to draft this young man. I

425

told them that I thought the government was wrong in drafting him. I don't think the government was wrong.

I had a conversation with Mr. Groelz. He said something about the government being wrong. I don't recall. Ryder said nothing as I remember.

I didn't know whether or not Mr. Pierce was a German. I can't tell anybody by their looks. 426

I didn't know he wasn't German when he spoke to me. I said something to the effect that I was opposed to the war because of England. I told him I was opposed to the war because I was Irish. I wasn't opposed to the war because I was Irish. I lied in both instances.

I stayed in the saloon with Mr .Pierce as I recollect ten or twelve minutes. He referred me to 427
Mr. Lorey about the photograph. Mr. Lorey is a photographer. State Street is one of the main streets. Mr. Lorey is a prominent photographer. On the card I saw Mr. Lorey, photographer and Mr. Pierce, representative.

I knew the men were arrested, August 26th—was in the Commissioner's office on the 27th, and on September 10th. 428

I did not tell the Commissioner what transpired between myself and Mr. Pierce. I first told of the circumstance the day it occurred. I told Mr. Fletcher Blanchard, one of the Federal investigators in Mr. Ford's office, Department of Justice.

I saw him in Court and told him what I have related prior to the time they were arrested. He

429

knew all about it. I knew Mr. Pierce was the same man who appeared before the Commissioner. I was asked to testify before Mr. Mills but requested not to be called.

Re-Direct Examination to Mr. Cregg:

430 I also requested you not to call me if it were possible. The statements that I made in the saloon I made for the purpose of drawing out th defendant.

MRS. MARY KENT, sworn.

431 Direct Examination to Mr. Lucey:

I reside at Albany, New York, 734 Clinton Avenue. I am married—have four boys between the ages of 21 and 31. One of them is in the army.

I remember on the morning of August 26th last of finding the pamphlet of which Exhibit I is a copy, on our front door step. I saw where it said "The Price We Pay." I didn't read any more

432 than the head lines.

I brought it in the house and laid it on the table. I saw my girl pick it up and throw it down. I think one of my sons picked it up. I did not see him looking at it. I did see him look at it.

The Government Rests.

433

Mr. Talafierro: If the Court please, I move, your Honor, in behalf of each and every one of the defendants to dismiss the entire indictment upon the ground that the same or any count thereof is not sustained by the evidence sufficiently to convict these defendants of the crimes therein set forth. I do not think it is necessary to take up time. I know the 434
care your Honor has given to this case. I suppose your Honor has made up your mind and it would be unnecessary to take up the time. There is no evidence to justify a verdict against these defendants on any count of the indictment. In pointing out the method of obstruction emphasis is laid upon the fact here of the false statements; that is simply 435
one of the methods of obstruction, and I submit to your Honor that if a conviction was rendered that it would be the duty of the Court to set aside that conviction. I would like your Honor to pass on that motion.

Deny the motion. Exception.

I move, your Honor, to dismiss the first 436
and second counts of the indictment, charging a conspiracy on the ground that there is no evidence sufficient to sustain it under those counts.

The Court: I feel, Colonel Talafierro, that there is evidence that they were all acting together. There is certainly evidence that two

437 were acting together, and then the other two, and there is some evidence that they were all connected.

Deny the motion. Exception.

I move further to dismiss the indictment as to the third, fourth and fifth counts; that there is not sufficient evidence to sustain the
438 conviction on any one of them.

Deny the motion. Exception.

I renew the motion made at the beginning of the trial that the District Attorney be required to elect whether this trial shall continue upon the first and second counts of the indictment or the third, fourth, fifth and
439 sixth.

Mr. Lucey: I prefer not to do that. I decline to make that election.

The Court: I think, Colonel, that if the jury should find that they were acting in concert with a common understanding and pur-
440 pose that they would be justified in finding a verdict on the evidence. Now if the jury should find that two only were acting in concert they could find that as to two, not as to the other two, because to find a conspiracy there has to be two or more, but should the jury fail to find they were acting in concert, if they committed no act to carry that conspir-

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acy out to execution and they should find that they distributed the circulars but not in concert with the intent specified, if they acted independently, they could not find them guilty together, but they could under certain counts find them guilty separately. Of course there are several counts, but they are all of the same nature,—to convey false reports or false state- 442
menst or to interfere with the military or naval forces of the United States; that is an offense, or to promote the success of it's enemies that would be an offense; refusal of duty that is another offense; or shall openly obstruct enlistment to the injury of the service of the United States, that is another offense. Now it is possible that the jury might, of 443
course, find them not guilty as to all of those and they might find under this evidence that the intent was to do one or the other not all. They might find it was the intent to do all. So I do not see that I can justly or properly compel the government to elect to stand on any one of the counts because here the jury are the judges, not the court. As to the evi- 444
dence of their intent or purpose, I have no right to decide what the intent was; it is a question of fact for the jury; whether it was the intent or purpose to do the one thing or the other is peculiarly for the jury and not for the court. I don't see how I can compel the United States to elect. It goes to the jury.

445

If they find they were not acting in concert, all of them, they can't find the four guilty of conspiracy. If they find two of them, that would be a conspiracy of two. An overt act makes the crime complete whether the offense that they conspire to commit is committed or not. I will deny the motion, each one of them,
446 and give you an exception.

447

448

449

Defendants Open.

EDWARD F. SMITH, recalled.

Direct Examination to Mr. Talafierro:

I was secretary of the Albany local on the 11th and 25th of July, 1917. 450

That is the minute book and my handwriting under date of July 11th and 25th.

That is a correct entry of the proceedings that took place there at both these times. Original entry made at the meeting.

Minute book offered in evidence as to part of the action of Albany local, July 11th, 1917.

451

Motion made.

Marked Exhibit 2.

At the meeting, July 25th, 1917, this resolution was passed,—"motion passed to rescind action of local of two weeks ago in passing a motion against distributing "The Price We Pay," and called for distributors."

452

Offered in evidence. Marked Exhibit 3.

Mr. Lucey: I would like to ask if the Colonel is offering that on behalf of all the defendants,—he says that only Pierce was there; the others did not know about it. If it is for the benefit of the defendants can it be for the benefit of those that were not there?

453

Mr. Talafierro: I do not take it that way at all.

Mr. Lucey: We have done a good deal of talking about who was at the meeting.

The Court: Here is an association, a local, to which they all belong, they are all mem-
454 bers. Now they had a committee on literature at this meeting. Of course they were asked not to distribute that circular until they found out whether it was legal or not. If they did anything they were all informed of it. The 25th of July they rescind that, and they have offered that resolution. The witness testified that then they had some of these
455 circulars there, talked about them. This witness has already testified that while some of the defendants were not there that perhaps two or three were. Others stated they knew that they had distributed literature and they knew they would.

Mr. Lucey: My point was that it should be used only on behalf of the one who was
456 there.

Witness: Mr. Smith, Mr. Arland, Mr. West and Mr. Wensley were the literature committee.

I heard that Mr. Goldwitz is in New York City. I heard he went to Camp Dix.

Wensley is in the Troy Hospital. He is of the draft age.

Edward F. Smith, Recalled

457

Cross Examined by Mr. Lucey:

I don't know that Hunt was there on the 25th. I think he stated he wasn't.

Mr. Talafierro: He was there on the 11th not the 25th.

Witness: So far as I know the local had not taken any counsel with Mr. Hunt, between the 11th and the 25th as to whether it was lawful to send it out. 458

Re-Direct Examination to Mr. Talafierro:

I first saw what purported to be a decision of Judge Rose about the Baltimore case, in the paper of July 12th or 13th. It was published in the New York Call. 459

Q. Is that the decision that you saw which you say purported to be the decision of Judge Rose?

Mr. Lucey: If we are going to get down to the matter of calling something a decision, I submit that we have the paper that was read. I would like to know whether the indictment was there whether the decision was there, or whether there was just a newspaper clipping. I say the paper should be produced which was read at that time. 460

The Court: The paper would be the best evidence. If this witness has a copy of the New York Call (that is something new to me), if he has a copy of it that had that in I would not insist that he have the particular paper that he saw.

461

Mr. Lucey: The paper that the man said he read is the only evidence of what he read.

The Court: It is the best evidence.

Mr. Talafierro: I submit to your Honor that this statement is in substance what he read. Of course he has not that paper; no way could we get

462 it.

The Court: Can't you get a copy of the Call for that day?

Mr. Lucey: There is no proof that the decision itself was published. I want to know whether the decision was there; they are depending on what they read at that time. Let's have what

463 they read.

The Court: What was in this paper? What did he see, what did he read?

Mr. Talafierro: I submit to your Honor that it is competent for us to show that was the substance of what he read.

Mr. Cregg: The paper is the best evidence.

464 Paper marked 4 for identification.

By Mr. Talafierro:

Q. Mr. Smith, you read what purported to be a decision of Judge Rose of Maryland published in the Call.

Objected to as incompetent, irrelevant, calling for a conclusion, and not the best mode of proving

465

the decision itself. There is no trouble about getting a copy of a newspaper. These men have had ever since the 26th of August if they wanted to show us just what they read.

The Court: You may ask him if he read something in the newspapers.

Q. Did you read anything in the paper of the 12th or 13th of July about the Baltimore Case? A. Yes. 466

Q. What was it?

Objected to on the ground that the paper itself is the best evidence of the contents of that article, and that there is no foundation laid for asking that question.

The Court: Q. Did it have any heading or statement as to what it was? A. Yes. 467

Q. Can you remember what the heading was? A. I can't recall the exact words, but it said "Two Baltimore Socialists dismissed."

Mr. Lucey: It was a newspaper article and not the decision at all.

468

Mr. Talafierro: That is the heading.

The Court: Q. Can you repeat what you read after that? A. I can't recall the exact words, I can give you the substance of it.

Q. How long was the article? A. The article was about three or four inches,--about three inches long.

469

The article itself? A. The body.

Q. It was two, three or four inches long? A. Exclusive of the headlines.

Q. It was an article with headlines which you have given? A. Yes.

Q. In addition to that there was a printed article under? A. Three or four inches long.

470 Q. Is that what you mean? A. Yes.

Q. It didn't purport to give the full opinion? A. It gives, I should consider, the substance.

Q. Since then you have seen a paper which purported to give an opinion of Judge Rose, haven't you? A. Yes.

Q. Which occupied two or three columns of a newspaper, wouldn't it? A. If it was printed in

471 full.

Q. If it was printed in full? A. Yes.

Q. It wasn't that? A. It wasn't a decision.

Q. Was it that opinion,—do you know what I mean? A. Yes.

Q. In full? A. No, it wasn't in full.

Q. Now it was some statement about it; isn't that self-evident to you?

472 Mr. Talafierro:

Q. When did you see the opinion in full, or what purported to be the opinion after the 11th of July? A. I don't know just what date it was.

Q. About when, do the best you can. Was it between the 11th and 25th of July? A. Yes I think it was about the 21st of July, I should say, that I saw it.

473

Q. Where was it? A. In the American Socialist.

Copy of issue later obtained and offered in evidence. Item received and Marked Def. Exhibit 6.

474

ANGELO CREO defendant sworn for the defence.

Direct to Col. Talafierro:

I live at 84 Central avenue, Albany, New York. I am one of the defendants. I am a barber—29 years old—Born in Italy—Meridan—near Naples. Have been in the United States since 1902—15 years. Have been in Albany since 1909—8 years. 475

I am a naturalized citizen—naturalized in 1915. I obtained my first papers. I am single. I have registered and have been drawn in the draft. I have my card. This my card, also the State registration.

I have not yet been called to the service. If I am called I am ready to render service in the war. 476

The date on my card is June 5th 1917. Since that time I have been ready and willing to perform services in the army.

I have made claim for exemption, it has not been passed upon. I have not been called.

I was not at the meeting of the Socialist

477

Local in Albany on the night of the 11th of July. I must have been either at home or at the moving pictures or at the restaurant.

I afterwards learned from some men what took place, from Alfred L. Arnold. He is a member of the Local. He said he was present.

478 I learned from him about the resolution being introduced and passed.

The purport of the resolution was that the legality of the "Price We Pay" had been questioned and that they had decided not to distribute any literature until it's legality had been established.

479 I was not present at the meeting of July 25th. The following morning I learned what took place from Mr. Pierce. He is one of the defendants. He told me the resolution that was adopted then in regard to the circulation of literature. He said that the resolution of the 11th had been rescinded and that the "Price We Pay" had established to be distributed.

480 Within a week after the 11th of July I I learned that a decision had been rendered in the Baltimore case. I read it as an item in a newspaper.

A few weeks after the 11th of July I read in in the American Socialist what purported to be the full text of Judge Rose's decision of Baker and another whom I do not remember.

481

Witness shown paper marked Exhibit 4 for identification.

I did not read what purported to be Judge Rose's decision carefully—This is a copy of what I think I read about the case.

Exhibit 4 offered in evidence—Objection incompetent, immaterial, irrelevent and not the best evidence. 482

Sustained—Exception.

I did not distribute the slip of paper called "The Price We Pay" at any time or place between the 11th of July, 1917 and the 25th of July, 1917.

I knew the resolution was passed on the 11th and rescinded on the 25th. 483

I distributed a whole lot, possibly six or seven hundred slips of paper called "The Price We Pay" on the 26th of August last.

My intention in distributing them was to make converts for Socialism. To convert the people to changing capitalism into Socialism.

There was not in mind any intention to interfere with the operation or success of the 484 naval or military forces of the United States.

Nor was there any intent or purpose on my part to obstruct the army or navy in any way or to interfere in any way with the military operations of the United States. I had no such thought in mind.

I did not intend to convey any false state-

485

ment or false reports to anyone or to circulate any false reports.

I have one brother in this country. He lives and is working in Newark, N. J.

I have a brother in the Italian army at Naples.

486 Cross Examination by Mr. Lucey:

On the 26th of August, there lived with me, Mr. Pierce, his wife, a Mrs. Marcus, and a fellow whose name I do not recall at present—Mockler or something like that.

I sleep at Pierce's, occasionally eat there. Pierce keeps house. He has no children. I have a room in his apartments.

487 I know a man by the name of Michael Quaranto—I couldn't tell you where he was August 26th. He had not lived at the same place I did. He did not have a room at Pierces'. I think he lives on Jefferson street by hearsay—I was acquainted with him a long time ago. As I recollect he was living on Jefferson street then. He was not a friend

488 of mine. He was an Italian.

As I recollect he did not come to the place where I lived. He had no room there, nor near there.

I have lived there since Mr. Pierce moved there—for several years. This man never had rooms at that house.

An Italian beside me lived there this sum-

mer after June 5th. His name was Nicholas Quaranto. He was an Italian and single. He is not living there now. He left about the time we were arrested: August 26th. 489

He had been drafted, I don't know where he went. He had been living with Pierce and me.

I did say I was not at the meeting of July 11th. I heard of it next day. I said Fred L. Arnold told me. I saw him at my barber shop. 490

He told me about the "Price We Pay" being laid up pending the Baltimore case.

I had seen the article about April or May in the American Socialist but not in leaflet form, at that time. 491

I read the article at that time and remember what it contained practically.

I am not able to say that article as published was in all its parts as the leaflet. I am not able to say that it was changed. It may have been changed, but I don't think so. I have not compared them.

Mr. Arnold told me about other matters. 492 He told me there was some discussion about it.

I think I next talked with Mr. Pierce about "The Price We Pay." That was after the second meeting. I think I had seen the pamphlets in the meantime at Pierce's house. I think that he had some there. I first saw

493 them about July 17th, was about the day the supply came—about five thousand.

I may have put copies in my pocket— am not positive.

I first learned it was to be distributed a week or so after the meeting.

Pierce told me on the 26th that the resolu-
494 tion of the 25th had been passed. He said that the meeting had rescinded the motion of the 11th concerning "The Price We Pay."

He said it would be distributed and he and I agreed to do it, and we did do so. I did not hear that Zeilman or Nelson would distribute. I did not know or hear that Smith had volunteered. I had volunteered at the
495 previous meeting to distribute literature. I was not a regular distributor. I did not volunteer until July.

About a week or two after the 25th and after my agreement with Pierce I distributed some. I do not recollect that I did before the 25th. Decidedly not before the 11th.

I distributed in Albany either the Sunday
496 following the 25th or a week later.

Pierce and I went out together—one would take one side of the street and the other the other. I think there was a third fellow with us. He began with us. He came to the house and we started out together. A short lad I don't remember his name. We made a plan to go out Sunday. It was a common occur-

497

rence for the Socialist Party to distribute.

Pierce and I went out three or four times before August 26th. The other man but but once.

On the 26th of August I saw Zielman and Nelson distributing . Before that I saw Zeilman but not Nelson. Zeilman went out two or three times before we were arrested. 498

I did not talk with Zeilman about it. He got his supply of pamphlets at 84 Central Avenue. I don't know who told him to come there for them. I was there when he came. Nelson was not there the first time that Zeilman distributed nor anybody else.

Zeilman came to his house about half past five or so in the morning. I was not up. I believe Pierce was. I was in bed when I learned Zeilman had come. Pierce told me, woke me up, said "Get up we got to start," said it was half past five. 499

I knew Zeilman and Nelson before this.

The pamphlets were in the dining room, I think, I got mine on the stoop. Pierce had them there when I got down. Zeilman got his bundle there too. 500

On the first day that Zeilman distributed, I think we met somewhere near his house.

On the first or second time that we went out with Zeilman, we met on the corner of Ontario Street. But once as I recollect.

On Sunday morning of the 26th, I am pos-

501 itive that Zeilman came to Pierce's house.

On the Sunday morning we met Zeilman on the corner of Ontario Street, there was another whom I cannot recall, waiting there. I got the pamphlets at Pierce's house, that morning. We were giving them out when we reached Zeilman.

502 I am uncertain whether Zeilman had some at his house, and brought some with him or not. Either we waited for him or he for us. We both knew the other was to be there.

It was agreed between us that one would take one street and another, another street. Each started out to cover their own territory. We began distributing the "Price We Pay."

503 I distributed about 500. Zeilman and Pierce about the same each. We met again after the work was done and each went to his own house.

This was either the second or third Sunday after the 25th. We went again once before August 26th—when the young fellow I referred to went—but Zeilman did not go.

504 This young fellow may have been a member of the Young People's Socialist League. There is an association for young people to study socialism.

This young man and Pierce and I started from 84 Central avenue together . He came to Pierce's house. Got his supply there.

We agreed on territory also each took a

different side of the street. It was agreed that Pierce should tells us where to go. 505

On the following Sunday, the Sunday prior to August 26th three of us distributed, the third being either Zeilman or the young fellow I referred to a little while ago.

There was no necessity of talking about it. We knew we had literature to distribute. 506

We went every Sunday as agreed, and we knew we were to go out.

I remember pretty well about August 26th. I believe I had not been to the Socialist Party room between July 25th and August 26th.

As to the copy of the Socialist paperI saw, I was a subscriber to the American Socialist —a weekly paper and I bought the New York Call at the news stand. 507

I am also a subscriber to the Liberalo Italian Weekly published in Chicago.

I am not now a subscriber to the American Socialist, cannot say when it stopped. Cannot say that I received it in August, I believe so in July.

This copy in which I saw Judge Rose's decision may not have been my own. I might have seen it at Mr. Pierce's house. He was a subscriber. He buys the Call at the news stand. He is also a subscriber to another Socialist paper—Public Ownership. I have seen these papers at his house. 508

I saw a news item of Judge Rose's decision

509 in the Call and a lengthy report in the American Socialist. I read about Judge Rose's decision either at Mr. Pierce's house or my barber shop. I bought them for my own reading. I did not have them around the barber shop.

I have told you all the papers that I remember that Mr. Pierce subscribed for. I do not
510 remember seeing around there the New York Times, nor the Herald, The World, nor the Sun.

It is not true that the only papers I have seen in Mr. Pierce's house were Socialist papers. He buys every night at the news stand The Times Union, the Knickerbocker Press and often the Albany Journal.

511 I might have used the copy of the Call in which I saw the notice of Judge Rose's decision as shaving papers. I did not keep it.

Q. What copy of the Call did you have here in Court yesterday? A. A later edition, of recent date.

Q. Was there anything in that about Judge
512 Rose's decision? A. No.

Q. How many copies of the Call did you bring with you? A. In this room?

Q. In this Court. A. I do not know as I have brought any. I came across a paper—

Q. What did you do with the copy of the American Socialist in which you read of the decision? A. I do not know.

513

Q. Did you have that here in Court yesterday. My paper? **No.**

Q. Who did have it? A. I saw it with the defense, I believe.

Q. You saw here a copy of the paper in which you read a copy of the decision of Judge Rose? A. Yes.

Q. So that the defense have a copy in the Court 514
right now a copy of that paper? A. I don't know whether they have it now.

Q. Was it here yesterday? A. Yes.

Q. So as far as you know there is a copy right here in Court? A. I left it this morning—

Q. So far as you know there is a copy right here in Court? A. I do not know who got that newspaper. 515

Q. Do you know that the copy is here in Court this morning? A. I left it in Mr. Panken's room this morning.

Q. That is the last you saw of it? A. That is the last I saw of it.

Q. You do not know whether he brought it into Court? A. I do not.

Q. That is the one that was here in the Court 516
yesterday? A. Yes.

August 26th was Sunday. I knew Saturday that we were going out Sunday to distribute "The Price We Pay." It was already contemplated in distributing all the literature we had on hand. It was a regular thing. Pierce, Zeilman, Nelson and I arranged on the

Angelo Creo, Sworn

517

26th to go out that Sunday morning. I had no arrangements or understanding with either Zeilman or Nelson to go out on the 26th.

Nelson and Zeilman came into the matter the same Sunday morning, when they came to Pierce's house.

Pierce and I were home the night before.

518 It is my impression that I first saw Zeilman and Nelson that morning when I came down to the stoop, waiting for me. We four were there together. The pamphlets "The Price We Pay were there too.

It was decided on the stoop that Zeilman and I would start west on Central avenue. I presume it was agreed that the others were

519 to start there also.

Each of us took a bundle of pamphlets and each started on the street agreed on. Zeilman and I went up Central avenue to Clinton. We then turned back on Clinton avenue east on Ontario, we came back to Clinton and then down to another street—I do not know the name of. Altogether Central, Clinton,

520 Sherman and Lexington and others down to Robbins and Sharon.

We distributed 500 or 600 each. We had lots left when we were arrested.

I am single. If the law compels me I am willing to serve this country. I am willing to obey the law. I am willing to go if my claim is not accepted.

521

I know that I could get into the war by volunteering to serve.

Q. You have not enlisted, have you?

Objection — incompetent, immaterial, irrelevant and grossly improper.

Overruled—

522

Exception.

A. I have not.

Redirect by Mr. Talaferro:

I have never been arrested, charged or convicted of any crime.

As we were distributing, and as Mr. Toohey has testified I handed him a copy of the literature I was distributing, "The Price We Pay" and proceeded. After that my attention was attracted by voices of someone who was hollering, "Here fellow, come back, none of that stuff, etc." I turned around and listened and I assumed that was one of the fellows that I had given a copy, and I said, "Now, somebody's looking for trouble" or something like that and proceeded right along. Mr. Toohey was in civilian clothes at the time . Then I heard him coming along still hollering, "Here fellow why don't you stop? Why don't you stop when a fellow tells you to?" I explained that I didn't know that he was hollerin to me to stop and he says,

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524

525 "Who gave you the right to distribute that kind of stuff?" I said it was my duty to the Socialist Party. He said, "I guess you don't know who I am?" I said no, and he unbuttoned his coat and showed the button of a police officer. "Who gave you permission to go around the street with this kind of stuff
526 this early hour in the morning?" and pulled out his watch and it was around six o'clock. Ten or fifteen minutes of six o'clock. He said, "Don't you know you are breaking the law?" "Now," he says, "I don't want to be mean about it but * * I said "Well officer, in distributing our Socialist literature I am aware of breaking no law, but
527 if you think that I am, then it is your duty to arrest us and you may do so." He was embarrased. By this time Zeilman, who was a little ahead of me joined us, and he tells Toohey, "why officer we have been doing this for years," or something to that effect. "Well all right then," Toohey said and he left us and he said, "Be careful, though and do not
528 break the law." This about all the conversation I had with Toohey.

Redirect by Mr. Talafierro:

Our meetings are public, nothing secret about them. Whenever we can, we have open meetings that are advertised. I have secured a copy of the **Socialist** during the noon recess,

529 from Judge Panken, one of the attorneys for the defense. The date of the paper is August 4th. It was that issue that I read. I did not preserve my own copy.

Cross-examined by Mr. Lucey:

530 August 4th was the date of the paper that I read.

I heard Mr. Smith testify that he read it between July 11th and 25th. I saw it after it was issued and delivered either to my barber shop or to Mr. Pierce's house.

That is the copy that I gave Judge Panken this morning.

531 Defendant's Exhibit 5 offered, read and received in evidence.

CHARLES NELSON sworn for the defense.

Direct by Mr. Talafierro:

532 I am one of the defendants, at present I live at 84 Central avenue, Albany. I am a painter. Have been in Albany two years. I was born in Wrink, Russia . Have been in the United States seven years. Am 25 years old. I declared my intentions to become naturalized in 1912. I am registered for the army. I have my card with me. It is dated June 5th, 1917. I now live with Mr. Pierce.

533 My mother did live with me in Albany but she has moved to New York. I did not live with Mr. Pierce when we were arrested.

I have a brother 29 years old, in the United State army at Camp Devens. He is naturalized and was called to the colors from Albany last week, to serve in the army. My
534 mother has no other sons except myself and brother. If I am drafted I am ready to serve in the army.

I was not at the meetings of the Socialist Party Local in Albany, July 11th or July 25th last.

I did not hear what took place on the 11th about the distributing "The Price We Pay."
535 After the 25th I think I heard about the resolution, not to distribute, at the same time I heard that the resolution had been rescinded on the 25th.

I speak a little English. I distributed "The Price We Pay" with the others.

I heard Mr. Creo testify.

My intention in distributing this literature
536 was to increase the membership of the Socialist Party. I thought it was good literature.

I had no intention to interfere with the military or naval forces of the United States or with the operations of the army or navy, nor with any intention other than to build up the Socialist Party.

I did not have knowledge that the circular

537 contained any false statements. I did not believe that it did. I had read it.

Cross-examination by Mr. Lucey:

I can read and understand English a little. I have been to a private school.

I had read the article in the American So- 538 cialist. I thought it was good. It is not like but is one of the socialist literature that I read.

I joined the party two years ago. I go to some meetings but not all the meetings. I know a great many socialists in Albany. I do not talk with them about the meetings, nor meet outside of the lodge room. I talk with 539 Socialist outside of the rooms. Have lived at Pierce's house about two months. I commenced in September. I first saw the pamphlet "The Price We Pay" in pamphlet form the day we distributed it.

I had seen it in the American Socialist before. I take the paper.

After the 25th of July I heard someone talk 540 about the two meetings. I heard about their deciding not to send it out, and of the decision to send it out.

I heard this talk before August 26th. I did not distribute any pamphlet before August 26th.

I learned of the distributing in an open air meeting, August 25th from Mr. Pierce. The

541 meeting was held on the street corner of State and Pearl, Saturday night.

Patrick Quinlan was there speaking about Socialism. Mr. Pierce said if I knew of anyone who would distribute literature tomorrow morning and I volunteered. He did not tell me what we were going to distribute. I had
542 not distributed before.

I have delivered the New York Call, Sundays. It is a Socialist newspaper.

Pierce told me to be around as early as I could.

I didn't know Zeilman, I didn't talk with him or Creo that evening. I knew where Pierce lived. Had been there once six months
543 before. I went that morning about half past five. I waited for someone to show up, for five or ten minutes.

I got a bundle of literature from the bed room down stairs and met Mr. Zeilman on the steop, waiting. We did not speak, I got off the stoop and Pierce came with a bundle of "The Price We Pay."

544 He told each of us to take a bundle and I think he said what it was. No one said anything, we had no time to talk. I never cared to talk too much. We were five minutes opening bundles, and waiting for Creo. We agreed as to where we should go. I went alone on the street next block from Central avenue.

Pierce didn't go, he waited for others to

545

come. He said, "Somebody else might show up, I'll wait."

Zielman, Creo and I left at the same time. They took Central avenue. I distributed a big bundle. I went as far as Clinton avenue before I saw Zeilman and Creo again. I saw [illegible] Lake avenue, distributing alone.

I have a brother in this country. He is 29. 546
He has been drafted and called.

I have not yet been examined. My number has been drawn. I am 25. If I am called I am ready to go. I will not go until called. I have not volunteered.

Re-direct to Col. Talafierro:

I lived at 503 Lafayette street the day I was 547
arrested with my mother. I was held by Judge Mills to answer to this Court. I was put in prison for a month.

As long as my brother is gone to war I am my mother's only support. She is sixty-five. She is now in New York—she has two daughters—two sisters. My father is not living.

548

Re-cross examined by Mr. Lucey:

My mother went to New York in September. My brother is twenty-nine, a painter. We lived with mother, one sister lived with us, going to school. The other is married and lives in New York.

I did not apply for my second papers, be-

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cause having changed from New York to Albany, I couldn't get any witnesses. Have been here two years, in the country seven. The necessity of the witnesses any particular place was my idea of it. I haven't tried any place. My brother did not volunteer to go to war. He was drafted.

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Re-direct to Jacob Panken:

I knew that you must have witnesses to testify to the fact that one has resided in the country five years.

551

CLINTON H. PIERCE sworn for the defense.

Direct to Mr. Talafierro:

I live at 84 Central avenue, Albany. Have lived in Albany 35 years. I was born in New York. My father was born in this country. I am married and my wife and I live in Al-
552 bany. We have no living children. And I am 53 years of age.

I am a photograph solicitor, solicit orders from people for Gustave Lorey, 156 State Street, Albany. I was employed at that August 26th last and for the past four years. I sell on a commission.

Last July and August I was a member of

553

the Socialist party; have been for the last twenty years.

I was present during the whole of the Socialist Party meeting the night of July 11th. It was positively an open meeting. I saw Mr. Smith there and Mr. Hunt the attorney there.

I remember of the resolution being adopted not to distribute "The Price We Pay." We meet every two weeks. 554

I was at the meeting of July 25th last. I recall the resolution being adopted that night rescinding the former resolution. Mr. Smith was present. Mr. Creo or Mr. Zeilman were not present at either. I am not positive about Nelson.

555

Three or four days after the 11th I heard of the Judge Rose decision in the Baker-Wilhide case. I saw a news item in the New York Call and in an Albany paper.

Between the 11th and 25th of July I did not distribute "The Price We Pay." I first distributed it July 29th, as I remember, after the passage of the rescinding resolution. I had distributed some of them August 26th when I was arrested. 556

A large bundle was brought to my house July 17th, by Crandall, the literature agent of the Albany Local.

I have been extremely active during recent years as a Socialist in Albany. Have distrib-

557 uted literature for the last fifteen years not only in Albany, but all over the country.

I knew of the author of this pamphlet, he is an Episcopal clergyman, I understand with a pastorate in Chicago.

My purpose in distributing those pamphlets was the same as ever to induce men and
558 women to study socialism and become converted thereby.

I had no intent to interfere with the operation or the action of the naval or military forces of the United States.

I positively had no intention to interfere with enlistments in the army or navy of the United States.

559 I have known an Italian by the name of Quaranto for the last three or four years. I do not know what became of him. It appeared to me that he ran away after he was examined for the army. I do not know that the police tried to find him but he left my home.

Possibly two days after he left, my wife and
560 I found a letter addressed to him from theExemption Board of Albany, notifying him to come there, so I took the letter down to the Exemption Board and told them about it. I told them that I did not know where he was but that it looked to me as though he had fled. The mail came after he went away.

I did not order or press him to go away. I

561

am not a man of means nor has my wife means. We keep house and rent out rooms as one means of getting along.

We rented one to Quaranto. He always paid. Nelson boards with us.

I heard the witness John Scully testify. I remember the saloon and talk with Scully, but I had no conversation with the other gentleman. I could not say he was present. 562

I went in that day to get a glass of beer on my way home and met Scully. I had not to my knowledge ever seen him before.

I did not say to him, "Do you know that I'm connected with the draft?"

I do not remember of having told to him a story of a young man, whose mother was in Russia, and that I thought the government should make provision in such a case, nor of telling him another story. 563

I did not say to him "Do you know that you are committing treason."

I had never been in that saloon before. I do not know the proprietor. He did not ask me, "How are you connected with the draft?" I presume that I might have said that I was soliciting for Mr. Lorey. I took orders from drafted men as well as men not drafted. 564

Possibly upon that occasion I gave him the leaflet "The Price We Pay"—I did not say to him "I could be arrested for treason if you were sucker enough to squeal" nor any state-

565 ment to that effect. The first I heard of it was in the court room yesterday.

At the 5th Precinct Station house, where we were taken the morning we were arrested, I believe I said to Officer Bain that Judge Rose of Baltimore had rendered a decision that it was legal and proper to distribute it
566 and I believe I had a clipping from the New York Call that I showed the officer. At Commissioner Mill's office I do not believe the officer and I had any conversation along that line.

It must have been a week after July 11th when I learned of Judge Rose's decision.

567 Cross-examined by Mr. Lucey:

I was at that meeting of July 11th. There were a few copies of the "Price We Pay" there. It was not read. I had first seen it maybe a week or more before the one in the American Socialist.

I don't know who brought the question up July 11th, but there was some discussion on
568 it. I was not in favor of distributing it at that time. I talked so. I thought it best pending Judge Rose's decision. I do not believe any were in favor of sending it out or voted against the resolution—I am not able to say so though.

I think Mr. Hunt was away at the time. About a week after I saw a notice of Judge

569 Rose's decision in the New York Call and in the Albany papers.

I did not see anything that purported to be a copy of the decision until the American Socialist of August 4th came out.

On July 25th the only thing myself or anybody else had was this newspaper item.

570 My best recollection is that Lewis T. Hunt was there on the 25th, but cannot be positive. I did not hear Smith testify that he was there. I will swear that Smith was there, but will not swear that Hunt was.

I will not swear that Hunt said anything, then. I did not talk with Hunt from the 11th to the 25th.

571 I voted in favor of the resolution on the strength of the newspaper item, and commenced within four days to distribute it, and kept on until August 26th.

I did not try to get a copy of the decision. I did not know whether it was the same kind of a case or not. I am not a lawyer.

572 All my life I have been a solicitor for thirty-five years in Albany, going up and down the streets. This saloon is on the corner of Fourth avenue and Broad street. Broad street is in the south end of Albany, parallelling south Pearl Street. I reside in that vicinity. I go around that way two or three times a month. I am well acquainted in that vicinity.

Clinton H. Pierce, Sworn

573 I understand Grell Bros. keep the saloon. I do not know that they are Germans. I am not acquainted with either of them. I do not think I could know whether I have been there. I casually stop there every day. In some saloon every day. I simply go in and mind mind my own business.

574 I remember the occasion Scully testified to. He was there and we had a conversation. I think I gave him a leaflet. I had some with me that day.

I told him I was taking orders. I can't remember that I told him that I was taking orders for photographs of the boys going to war.

575 I do not remember that he told me he had been drafted. I gave him my card. That is practically all that I remember.

Re-direct to Mr. Talafierro:

I am fifty-three. I have kidney trouble. That is one of the principal reasons that I go occasionally into saloons.

576 Recross by Mr. Lucey:

In that conversation with Scully at that time, I do not doubt that I said that I was making a specialty of selling photographs of men that had been drafted; it is a fact that I was making a specialty of it at that time.

577

CHARLES S. ZEILMAN, sworn for the defense.

Direct to Col. Talafierro:

I live at Guilderland, N. Y., eight miles from Albany. I have lived there for twenty-three years. Am fifty-two years old.

I am engaged in a foundry and machine 578
shop, hold stock in the Company, am Treasurer and Superintendent. I was such last August—since 1900.

I have been a member of the Socialist party seven years. I was born in Albany, I believe my father was too. My father is now dead seven years. He served three years in the war of the rebellion. He was a Post Office 579
employee for thirty-five years.

I have one boy. He is twenty-three. He registered on Registration day. He has attended college for the last three years. I rather think he has claimed exemption. He is a Socialist.

I was not present at the meetings of the Socialist party, July 11th and 25th. Ten or twelve days after the 11th, I learned of the 580
resolution in regard to the circulation of "The Price We Pay."

Within a day or so after the 25th I learned of the resolution of rescission. In the meantime I did not circulate the pamphlet. I first distributed July 29th with the force that went out that day.

581

Four or five days after July 11th I read the news item, reporting the decision in the Call, The American Socialist and the Albany papers.

The American Socialist in Court shows that I read the full decision in the issue of August 4th. The paper came to me by mail.

582 I purchase the daily Call occasionally. The Sunday Call regularly. My home is not in Albany but in Guilderland a short distance from Albany but I only go home for Saturday and Sunday and every Sunday I purchase the New York Call.

August 26th, when I was distributing "The Price We Pay" I had no intention to interfere with the operations of the naval or military forces of the United States. I had no intention to interfere with the army or navy enlistments whatever.

583

My only purpose was simply to educate the people to socialist doctrine.

I did not believe that the literature I circulated August 25th contained any false statements or reports. I understood the paper to be composed by a minister—Irwin St. John Tucker.

584

After the arrest I was taken to the station house, then to the office of Commissioner Mills for a preliminary hearing.

Officer Bain was there. He said nothing that I heard concerning the paper. He said

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something at the station house. He told me that we had a perfect right to distribute it. I did not see the paper "Protect Your Rights" on August 26th. I did not make the statement that day that I had taken that paper from among the other the day before. I had not seen it up to that time.

586

Cross-examined by Mr. Lucy:

I graduated from the Albany Public schools. I first saw "The Price We Pay" two or three weeks prior to the time we distributed them before July 29th.

I read it all through and understood it all.

The second time I saw it was the Saturday before the Sunday on which we made the first 587
distribution.

I spent my nights in the country and was not in the city on meeting nights. I did not try to keep in touch with the meetings nor learn of what they did unless some particular thing occurred.

Pierce told me about July 27th of the action of the meeting of July 11th, and the 25th. He 588
came to my house in relation to distributing literature. He could call on me. I had frequently distributed literature before.

It seems that Pierce told me that this meeting had rescinded the motion to suspend distribution and that they would distribute what was on hand. All I knew I learned from

589

Pierce. I am not in the city during the week.

Pierce told me that we would commence on Sunday. He would send a package of literature to my house. We were to meet on a corner. He was to go and Creo, to by best recollection.

590 That was Friday the 27th. I did not see him again that day or Nelson or Creo that day or the next.

I next saw Pierce on Sunday. The bundle was left at my house Saturday afternoon. I understand we were to distribute "The Price We Pay." I came to my house in Albany Saturday night.

591 I was up at five thirty. We usually got out early. I got my pamphlets and took them to the corner of Ontario and Clinton as agreed.

As I recollect Pierce, Creo and another young man, a Socialist whom I do not know was there.

This was July 29th. There was practically nothing to say but get busy. The young Socialist went with me. We took one street and 592 the others another. I probably distributed 500 of "The Price We Pay."

The next Sunday I met Creo and Nelson, by a telephone message, at a corner, and we distributed the same as before, but in a different neighborhood.

The next time was August 12th. I met

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Creo and Pierce not Nelson, by practically the same arrangement.

After that I did not distribute until the 26th.

I went out on the 12th in accordance with an understanding we had on the 5th.

I got word to meet at Pierce's house on the 26th. I went. Pierce came downstairs and 594
said "Where's the rest of the bunch." They had not arrived yet. He gave me the names which I do not recall, but later Nelson came. I did not know him and paid no attention to him. Pierce had gone to awaken Creo. He returned with the literature and we started out. Pierce waited for the others.

Pierce detailed us to our streets, and in ac- 595
cordance with that agreement we started off.

Later we met Pierce and Nelson distributing.

Re direct by Col. Talafierro:

Last year the Albany Socialist party had a city ticket and this distribution of literature was one of the methods of bringing to the at- 596
tention of the citizens the party platform.

597

CLINTON H. PIERCE, recalled.

Direct by Col. Talafierro:

I did not see the leaflet "Protect Your Rights" on the 26th. I did not distribute it that day or before, or see others do it.

Defendants closed reserving right to offer in ev-
598 idence as Exhibit—the item announcing Judge Rose's decision as published in the New York Call.

Offered in evidence as Def. Exhibit 6.

Motion by defendant's attorneys to dismiss the indictment as to all the counts, on the ground that the evidence is not sufficient to sustain the
599 conviction.

Denied. Exception.

Motion by defense that the Court direct the jury to return a verdict that the defendants be acquited.

Denied. Exception.

By agreement it was decided that counts 4 and
600 5 be struck out of the indictment and only counts 1, 2, 3, and 6 be considered.

601

Judge's Charge.

Ray, J.

Gentlemen of the Jury:

You will have to be rather patient with me, as this is not a case in which I can cover its legal aspect in a few words, and in a short time properly 602
present it for your consideration.

These defendants are charged in an indictment found by the Grand Jury of this County, and filed on the 25th day of October, 1917, with having formed a conspiracy to violate certain laws of the United States. The first and second counts of the indictment charge a conspiracy to violate certain laws of the United States; and each of these counts 603
charging a conspiracy sets out what the law calls overt acts, which I will explain to you more fully later on. Of course, both of these counts I shall submit to you for your consideration, and also the third count, which reads as follows:

> "And the Grand Jurors aforesaid upon their oaths aforesaid do further indict and present that throughout the period of time from April 604
> 6, 1917, to the date of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government; that during said period of time and on the 26th day of August, 1917, at the City of Albany, State and Northern District of New York and within the jurisdiction of

605 this Court, CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN and CHARLES NELSON (hereinafter called defendants) did unlawfully, wilfully and feloniously MAKE, DISTRIBUTE and CONVEY to John C. Bain, John F. Lookey and John Skelly publicly and to various persons in and
606 about said City of Albany, the names of said persons being to your Grand Jurors unknown, false reports and false statements in and through certain phamphlets herein attached and made a part hereof, and headed "The Price We Pay," which said false statements and false reports were in part as follows:

607 Attached to the indictment are copies of that pamphlet, which you have heard read, as follows:

"Into your homes recruiting officers (meaning U. S. Army Recruiting Officers) are coming. They will take your sons of military age and **impress** them into the army."

"And still the recruiting officers will come,
608 seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from gamblers."

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"Our entry into it (meaning the entry of the United States into the war with Germany) was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated and those American investors who bit on his promise would be hooked."

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"All of which statements and reports were and are wholly false and untrue and said statements and reports were so made, distributed and conveyed by the said defendants to the injury of the United States and its military and naval service and with the intent then and there to interfere with the operation and success of the military and naval forces of the United States at a time when the United States was at war, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

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Count Four, for reasons which you heard me state,—because it is substantially a repetition,—I have eliminated; and also Count Five,—as they are but repetitions of other counts, having but a single phrase different.

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Count Six,—that I shall submit to you:

"And the Grand Jurors aforesaid upon their oaths aforesaid do further indict and present that throughout the period of time

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from April 6, 1917, to the date of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government; that during said period of time and on the 27th day of August, 1917, at the City of Albany, State and Northern District of New York and within the juris-
614 diction of this Court, CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN and CHARLES NELSON (hereinafter called defendants) did unlawfully, wilfully and feloniously ATTEMPT to cause insubordination, disloyalty, mutiny and the refusal of duty in the military and naval service of the United States when the United States was
615 at war in, through and by means of articles printed in certain pamphlets headed "The Price We Pay," a copy of which is hereto attached and marked Schedule "B" and made a part hereof, and which said pamphlets were then and there and on the 27th day of August, 1917, published, circulated and distributed by the defendants in and about the said City of
616 Albany to John C. Bain, John F. Lookey and John Skelly and to various other persons and at various places, the particular persons and places being to your Grand Jurors unknown, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

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And it will be your province, Gentlemen, on the First, the Second, the Third, and the Sixth Counts of this indictment to say whether or not the defendants, or any of them, are guilty, and guilty as to all of those counts, or some one, or more of them.

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And in the first instance, Gentlemen, it is my duty to say to you, and I do say to you, that you are to free yourselves from all bias and prejudice that might arise out of the existence of the war now being waged between the United States and the German Empire; and free yourselves and your minds from all bias and prejudice, if any, that might grow out of, or arise in your minds from, the nationality of these defendants, or any of them. Come to the consideration of the case free from all feeling, passion, prejudice or bias, as you are to decide it upon the evidence, and upon the evidence in this case alone—the proof given by the Government and by the defendants, taking it and considering it all together.

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These defendants, Gentlemen, and each of them, are presumed to be innocent until proven guilty. This presumption of innocence goes with these defendants, and with each one of them, from the beginning to the end of the trial, and until after you, having heard all the evidence the remarks and arguments of Counsel on both sides, and the Charge of the Court, have retired to your jury room and there, on consideration and deliberation, are satisfied beyond a reasonable doubt that the

621 defendants are guilty. That is, each count is to be considered by itself, and then you are to say as to each count, guilty or not guilty, as you may be satisfied. And you may find the defendants, or any one of them, except on the conspiracy counts, or all of them, guilty or not guilty, on all the counts, or any one, or two of the counts, as you
622 may be satisfied.

The burden of proof is on the Government to establish the guilt of these defendants beyond a reasonable doubt; and the evidence must be of such a character, and so conclusive, as to exclude every reasonable hypothesis except that of guilt.

I have said, Gentlemen, that the evidence in the case, all together, must satisfy you of the guilt of
623 these defendants beyond a reasonable doubt. A reasonable doubt, Gentlemen, is just what the term implies. It is a doubt for which a juror, or all jurors, might be able to give a reason, if called upon. It is a doubt growing out of the evidence for want of certainty, or lack of evidence, or the strength or weakness of the Government's case, or strength or weakness of the defendants' case; may
624 be from other reasons, which establish or leave in your mind either a reasonable doubt of the guilt of the defendants, or of any one of them. If such a doubt existes as to any one defendant, on all the counts, of course you say not guilty. If such reasonable doubt exists, and remains in your minds, as to any one count, and not as to the others, as to that count, you say not guilty; and so on. That is

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true as to all the defendants, and as to each of the defendants. A reasonable doubt, gentlemen, is not a surmise, nor a guess, nor a speculation, nor a theory that the defendants may not be guilty, but it is, as I said, a doubt founded in reason, for which a reason may be given, which may arise in any of the ways I have mentioned, or otherwise. And it has been said, properly and wisely, that reasonable 626
doubt is such a doubt as will cause a man of intelligence and good judgment, after a presentation of the case on all the evidence, to hesitate in his own important affairs in life, or leaves your minds unsatisfied and uncertain as to whether the defendants are guilty or not.

Now, Gentlemen, under the Penal Code of the 627
United States, if two or more persons conspire to commit an offense against the United States—that is ,violate a law of the United States making certain acts, or certain act, an offense against the laws of the United States,—if two or more persons conspire to commit any such offense, and if one or more of such conspirators, or parties, do any act to effect the object of such conspiracy, the crime of conspiracy is complete, if you are satis- 628
fied of it beyond a reasonable doubt, of course. And in such case he may be fined not more than ten thousand dollars and imprisonment for not more than twenty years, or both,—imprisonment and fine not exceeding that, it being in the discretion of the Court, depending, of course, upon the seriousness and the character of the conspiracy. And

629 the Espionage Act, Gentlemen, to which I will call your attention later, contains this provision:

> "If two or more persons conspire to violate the provisions of sections two or three of this title,"—

Section 3 I will read to you; 2 I shall not read,
630 because it is not pertinent to this case.

> "If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accom-
631 plishment of which is the object of such conspiracy."

Now, Gentlemen, also:

> "Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal
632 laws of the United States approved March fourth, nineteen hundred and nine."

There is no distinction or difference, that I see, in what is a conspiracy, constituting an offense. The difference is in the punishment.

Now, Gentlemen, you will see from that reading and I charge you, in order that you may have no

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question, all that is necessary for the Government to do is to prove that the defendants, two or more —one man cannot conspire—two or more conspired to commit an offense or the offense to which I have called your attention, mentioned last in that section, and then to make the crime complete, one of the conspirators--one of the parties to the agreement—must have done some act to carry out, or to 634
carry into execution the object and purpose of that conspiracy. But it is not at all necessary, Gentlemen, in order to make conspiracy and the offense complete, that the defendants charged with the offense, or any of them, completed the crime they sought to commit, or conspired to commit. That is, if they conspired to offend against a certain law, and if some act was done in execution of such 635
conspiracy which might of itself be an innocent act, the crime of conspiracy is complete, even if the crime they conspired to commit was not committed at all, or effected. And to illustrate: Suppose that two or more persons conspire to rob a postoffice. One of them goes and buys a hammer, or an ax, with which to break open the door or window to the postoffice, so they may rob it. Now, 636
if you prove that they agreed together—combined together to rob the postoffice, and that then, in order to effect the object of that conspiracy, one of them went and bought the hammer, or the ax, or some other tool, for that purpose, the crime of conspiracy is made out,—of course if established beyond a reasonable doubt. The crime is then

637 complete, and it isn't necessary that they shall have actually gotten into the postoffice and robbed it.

I make that illustration, in order to make the idea plain to you. So here: If the Government has established to your satisfaction, and beyond a reasonable doubt, that these defendants, or any
638 two of them combined and conspired, as charged in the first count of this indictment and if you further find that two or more of them combined and conspired as charged in the second count, to commit the offense, or either of the offenses therein charged, and one of them so conspiring, of course, did any act—did any act, however innocent of itself, to carry out the purpose of that conspiracy—
639 an act in execution of such conspiracy,—and that is proved, of course, to your satisfaction, beyond a reasonable doubt, then the crime of conspiracy as to each count is made out. And it would be your duty, if satisfied beyond a reasonable doubt, to say guilty, notwithstanding the fact that the object and purpose of the conspiracy was not completed or perfected; that is, the crime they conspired to
640 commit was not committed. Now, Gentlemen, I trust I have made that plain to you.

The first count of this indictment charges that

> "From the 6th day of April, 1917, to the day of the finding and presentation of this indictment, the United States has been at war with the Imperial German Government and that during said period of time CLINTON H.

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PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN and CHARLES NELSON, at the City of Albany, State and Northern District of New York and within the jurisdiction of this Court unlawfully and feloniously have CONSPIRED, COMBINED, CONFEDERATED and AGREED together and with divers other persons to said Grand Jurors unknown, 642 to interfere with, prevent, hinder and delay the execution of certain laws of the United States, to wit:"

It then goes on and recites several laws, the first one being what we ordinarily speak of as The Declaration of War. It is the Joint Resolution of Congress, which was approved April 6, 1917, following within a short time—a few days—the address 643 the President made to Congress in joint session, which was testified to by Congressman Magee, and which address was read in evidence here in your hearing, for the purpose of showing what led to the war—what was the cause of the war, and why Congress and the President entered into the war,—Congress being the lawmaking body, and the President being the Chief Executive. And 644 that was done not only to show the existence of a state of war,—that is, this was put in evidence not only for that purpose, but the Message was put in to show, on behalf of the Government, what it alleges to be the fact, that a certain statement, or statements, in the pamphlet "The Price We Pay", charged in the indictment, was false, and known

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to these defendants to be false. And that resolution I will read. I will make it as short as I can. It was approved April 6, 1917.

"Joint Resolution Declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States and making provision to

646 prosecute the same.

Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the

647 United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Govern-

648 ment; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States."

And that is signed by the Speaker of the House, the Vice President of the Senate, and approved by the President of the United States.

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So, Gentlemen, the existence of that state of war is proved, and not questioned here, I take it.

Now, then, Gentlemen, the second item there,—"The Proclamation and Regulations of the President of the United States, dated April 6th, governing the conduct, treatment and disposition of alien enemies,"—no proof has been given as to that.

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And so with 3: "The Act of Congress approved June 3, 1916, and entitled "An Act for making further and more effectual provision for the national defense, and for other purposes,"—no proof has been given as to that.

And so with 4: "An Act Making Appropriations for Fortifications and Other Works of Defense," etc.

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Then we come to 5:

"The Act of Congress approved May 18, 1917, and entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States;" the Proclamation of the President of the United States, dated May 18, 1917, setting the time for registration under said Act; the Registration Regulations prescribed by the President of the United States, under authority of said Act, on May 18, 1917, and theRules and Regulations for Local and District Boards, prescribed by the President of the United States on June 30, 1917, under the authority of said Act; special reference being had to

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the provisions of said Act, Proclamation and Regulations for the Registration; selection and draft of persons available for military service."

And that is known as the Selective Draft Act. Proof has been given bearing on that claim, and
654 the claim of the Government is, that they have proved also that that was within the conspiracy, the intent and purposes of these defendants—as I will call your attention later on—to violate and interefere with that law.

Then 6: And this, the Government claims they have established,—an object of the conspiracy, and intent and purpose of these defendants; and
655 that it was their intent and purpose, and the object of their conspiracy, or one of its objects, to interfere with this law, and violate it.

"The Act of Congress approved June 16, 1917, and entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and bet-
656 ter to enforce the criminal laws of the United States, and for other purposes;" special reference being had to the provisions of said act concerning the prosecution and punishment of persons wilfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or wilfully obstructing

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the recruiting or enlistment service of the United States, to the injury of the service and the United States, or harboring or concealing persons who they know, or have reasonable grounds to believe or suspect, have committed, or are about to commit, offenses under Title I of said Act; and to the provisions of said Act concerning the prosecution and punishment of persons using or attempting to use the mails or Postal Service of the United States for the transmission of matter declared by Title XII of said Act to be unmailable and especially of letters, writings, circulars, postal cards," etc.,—quoting from the Act."

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And the Government claims that it has established here that the violation of that Act—not every item of it, but certain provisions of that Act, was within the object and purpose of the conspiracy formed by these defendants; and that it was their object and purpose to defeat the full execution and the carrying out of that Act, and to violate it.

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Now, as to 7: It recites certain sections, as to which no proof has been given—

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"And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that during said period of time the said defendants and each of them should and would discourage, obstruct and prevent the prosecution by the United States of said war between the

661 United States and the Imperial German Government and prevent, hinder and delay the execution of said laws above enumerated by personal solicitations, public speeches and various pamphlets which they should and would distribute and circulate intending and attempting to cause and influence various per-
662 sons available for military duty to fail to register and to refuse to submit to registration and draft for service in said military and naval forces and to fail and refuse to enlist for service therein and by inciting others so to do notwithstanding the requirements of said laws in that behalf and not withstanding the patriotic duty of such persons and others
663 to so register and submit to registration and draft and so to enlist for service in said military and naval forces and notwithstanding the cowardice involved in such failure and refusal, all of which was to be accomplished by the use of all the means and methods aforesaid as a protest against and as a forcible means of preventing, interfering with, hinder-
664 ing and delaying the execution of said laws of the United States and also to interfere with, hinder and delay the Government of the United States in its lawful efforts to build up and maintain an army for the carrying on of said war with the Imperial German Government."

Now, Gentlemen, it is my duty to say to you

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that in drawing an indictment it is usually made broad, so as to cover all that the defendants did and intended. And while the Government must prove the conspiracy charged in the indictment, it is not necessary for the Government to prove each and every part of it. If the Government proves it to your satisfaction, beyond a reasonable doubt, in its essentials—the essential part of it, 666 then of course the indictment is sustained. So you see there are some things in there regarding which no proof has been given; but the charge is, and the Government contends, that what these defendants did by this circular which they put out—I call it a circular—this printed pamphlet, or leaflet, that has been spoken of.—"The Price We Pay"—was intended to accomplish, and designed to accom- 667 plish, and was of a nature and character which might and would accomplish the objects of the conspiracies as charged in this indictment; that they circulated that pamphlet among the people with these objects and purposes in their minds.

Then it charges Overt Acts. Now, Gentlemen, as to the overt acts,—while there are three or four different ones charged here, I think there is one as 668 to which no evidence has been given. It isn't necessary, Gentlemen, to prove all of the overt acts charged. If any one, or more, is proved, as charged in the count of the indictment, that is sufficient, provided the conspiracy of that count is proved. So here this indictment charges:

"That during the continuance of said con-

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spiracy and for the purpose of effecting the object of the same, the said defendants and each of them did in and about the City of Albany, on the 26th day of August, 1917, make personal solicitations from various persons whose names are to the Grand Jurors unknown."

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As to that, there is one case, I think, which was within the time,—that was the man in the saloon. Personal solicitations; you have heard what was said about that.

Then it is charged that on the 26th day of August, as a further overt act, they made speeches. I think there is no evidence in the case that speeches were made.

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"And further during the continuance of said conspiracy and for the purpose of effecting the object of the same, the said defendants and each of them did publish and distribute to John C. Bain, John F. Lookey and John Skelly and other persons to your Grand Jurors unknown, in and about the said City of Albany, certain pamphlets headed "The Price We Pay," a copy of which is hereto attached and marked Schedule "A" and made a part hereof."

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I don't need to read the rest of that. The overt act consists, the Government says, in the circulation—giving out —to various persons by those men, of that pamphlet. You have heard the evi-

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dence on that subject, Gentlemen, and it is for you to say whether the defendants did give out—peddle and distribute to others that pamphlet; and, of course, was it done pursuant to an agreement, and an understanding, between them that they would do that? And, of course, with that goes those other propositions to which I have already called your attention,—that the conspiracy—the 674
doing of what they did so, or are shown to have done, must have been with intent to commit the crime charged, eventually, against the United States.

Now, Count Two, Gentlemen, is a conspiracy count, and charges the existence of war, and that these defendants at all the times mentioned,—I don't need to repeat it—that these defendents 675

> "feloniously CONSPIRED, COMBINED, CONFEDERATED and AGREED together and with divers other persons to said Grand Jurors unknown to commit a certain offense against the United States, to wit: The offense of unlawfully, feloniously and wilfully attempting to cause insubordination, disloyalty and refusal of duty in the military and naval 676
> forces of the United States when the United States was at war and to the injury of the United States in, through, and by personal solicitations, public speeches and distributing and publicly circulating throughout the United States certain articles printed in pamphlets called "The Price We Pay," which

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said pamphlets were to be distributed publicly throughout the Northern District of New York, and which said solicitations, speeches, articles and pamphlets would and should persistently urge insubordination disloyalty and refusal of duty in the said military and naval forces of the United States to the injury of
678 the United States and its military and naval service and failure and refusal on the part of available persons to enlist therein and should and would through and by means above mentioned obstruct the recruiting and enlistment service of the United States when the United States was at war to the injury of that service and of the United States."

679 Then the indictment charges as overt acts, that they did the same things that are charged in Count One, to which I have called your attention. And you can see that this conspiracy differs from the other as to the offense that was to be committed, and comes within the Act of Congress, to which I will call your attention. Now, Gentlemen, of course under that, the same remarks that I have
680 made here, apply. I don't think I need to repeat them, unless one side or the other asks me to do so. In other words, it was incumbent upon the Government, by a preponderance of evidence to satisfy you that these defendants, or two or more of them, conspired to commit that offense there specified, and that one or more of them, did some act to effect the object of that conspiracy—that combin-

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ation, that agreement. But it is not necessary for the Government to show that they accomplished the purpose of the conspiracy,—that is, that they did create disloyalty, etc. If they agreed that they would do it, and then attempted to do it, and one of them did an act to effect this object, and that, of course, is proved to your satisfaction, beyond a reasonable doubt, the crime of conspiracy is com- 682
plete. And of course, as I said before, it must be proved to your satisfaction, by a preponderance of evidence and beyond a reasonable doubt, and so as to exclude every hypothesis except that of guilt.

Now, Gentlemen, you will be given, I take it,—to save my reading it,—the Address of the President of the United States, made in Congress, 683
which tells you what he said there, and then the action of Congress, and which the Government says establish beyond any doubt whatever, the object and purpose of the war, and the falsity of some of these statements.

I will call your attention to the Address of the President, made to Congress just before the passage of the Joint Resolution declaring, or recognizing the state of war between the United States and 684
the Imperial German Government. That will be handed to you, and you may read it. The Government says that that contains a true statement of the reason why we entered the war; and that there was no other reason—no ulterior motive or purpose, and that you should so find. Now, Gentle-

685 men, that is for your consideration, and for you to say. It is important in this case as bearing upon the truth or falsity of some of the representations, or one of the representations, contained in the pamphlet "The Price We Pay." The Government says it has established, not only by evidence given by witnesses called by it, but by the admis-
686 sions and statements of the defendants themselves, called as witnesses in their own behalf, and placed upon the stand, that these defendants did, not only on the 25th day of August, but on some other days prior to that, circulate in certain neighborhoods and vicinities in the City of Albany, this pamphlet "The Price We Pay," going out early in the morning, giving it to anybody
687 they met, and also putting in on the doorsteps, and perhaps under the doors of some, or many, more or less, of the residents. And the Government says that the very nature and character of this pamphlet, and the statements therein contained, show what the object and purpose and intent of the defendants was.

688 The Government contends that it has shown that these defendants were all acting together; that they all belonged to the same organization of the Socialist Party, having its objects and purposes, and, so far as material and shown, it is for you to say what they were. So far as the proof demonstrates or shows, that while they didn't at all times stay together on the street, that still, on two or three occasions,—or two, perhaps,—you

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are to say how many—they did meet at the house of the defendant Pierce, where they had these pamphlets; that they did take them, and did go out and distribute them to various people, and leave them at the houses, as I have mentioned.

So the Government contends that it has shown a conspiracy, in the first place, in their peddling, giving out and conveying to others those pamphlets and statements—printed statements therein contained—in concert. And the Government says that that establishes this conspiracy. It is for you to say, Gentlemen; it is for you to determine. And was the conspiracy, if it existed, to offend against a law, or more than one law, of the United States; to defeat its execution, or to commit a crime—do something which the law pronounces a crime? That is the question in the first instance, for you to determine.

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Now Gentlemen, this word conspiracy means nothing more nor less than an agreement and an understanding between two or more persons that they will comit an offense against the United States; that is, do an act, or acts, which by law are made an offense or crime by an Act of Congress. That is what it means. And if two or more persons do so agree to commit a crime against the United States, then that is the first step in the conspiracy. Then the next step is, if one or more of the conspirators do some act—and that act may, as I said, be perfectly innocent, of itself,—to effect the object of that conspiracy,—if that is done,

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693 then the conspiracy, and the crime of conspiracy is complete. So the government says here, that defendants combined to offend against the law of the United States—offend against the laws of the Unied States; had an understanding, and then that they went out and peddled these pamphlets; and that that was an overt act. And that it is entire-
694 ly immaterial that the object and purpose of the conspiracy was not completed and carried out, because the crime of conspiracy was then complete. And so I have told you, Gentlemen, and tell you again,—that the consummation and doing of the ultimate crime is not essential if they did agree together to violate some criminal law of the United States, as charged, and if they peddled
695 these pamphlets in pursuance of that combination, and for the purpose of carrying into effect such a conspiracy.

Now, Gentlemen, to prove a conspiracy it is not essential for the Government to prove—it may not be essential for the Government to prove that the parties got together, and talked together, and that one said to the other, we will commit an offense, or
696 a crime, against the United States. And I tell you, Gentlemen, that that is true. A conspiracy to commit a crime against the United States may be proven in two or three ways: First, if you prove the defendants together, and there is someone who hears them talk, and hears them agree to commit an offense against the United States—commit a crime—that they will do it, why, then there is

proof of what they said, and of the oral agreement. And of course, if you had a writing, wherein they reduced it to writing, and signed it, there would be a written agreement showing the conspiracy. But usually, of course, witnesses are not called, there are no bystanders, and the parties don't reduce it to writing, when a conspiracy is formed. I am not saying what these defendants would do. So the law recognizes, Gentlemen, another way of proving a conspiracy, which may be just as potent and effectual as the other, if the evidence shows it, and establishes it. And it is always a question of fact for the jury, not for this Court to tell you whether it is established or not. It is a question of fact for the jury, whether it is established or not. The law, as I said, recognizes another way of proving a conspiracy, and that is by the acts alone, of the alleged conspirators—of the persons engaged in it. Even though you cannot prove the speaking of a single word by either of the alleged conspirators, you might prove it by their acts, if they are shown to be acting in concert—together, to bring about a common end—effect a common purpose. And I will refer to the same illustration that I did before, to make that principle plain to you. Of course, the Government says here that it has shown that these defendants did agree to meet together—had an understanding that they would meet together, and that they would go out and distribute these pamphlets "The Price We Pay." Therefore, the Government says that that part of

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701 it is established, not only by witnesses who saw them together, or near together—two of them in one bunch, and two in another bunch, and so on, but by the defendants themselves. The Government says that they admit that they all, I think, on one occasion,—or at least three of them, met at Pierce's house,— and I think on one occasion all
702 of them,—but it is for you to say. And then the Government says that the pamphlets themselves show that their object and purpose was to commit a crime against the United States—a violation of the statute to which I have called your attention, and will read soon, and that therefore they have established it in that way.

703 The Government says they have established it in another way, by those who did see them together—saw them acting together. And what I started to say was, that you could prove a conspiracy by the acts done, even if no words are proven. As, for instance, it is charged that A., B. and C. conspired to rob a postoffice. That is the charge; that is what they were to do, is to rob the postoffice, those three men. Now, the Government cannot
704 prove a word that either of them spoke; cannot prove that either of them did speak a word. But the law recognizes that a conspiracy to rob the postoffice might be proved by their acts; as, for instance, they all are seen in the town where the postoffice is located; one is seen to go and buy an ax, another is seen to go and buy an auger, or a bit—a bitstock, with several bits; another gets a

hammer, or something else. And someone sees how they are dressed; one has this sort of an overcoat, another that sort of a cap, another some other article of dress, as a pair of mittens. And then they are seen together talking, somewhere. And then along in the evening of the same day a noise is heard at the postoffice ;and upon going to the postoffice it is discovered that the door, or window, as the case may be, has been broken—partially destroyed, and an attempt made to get in. And you find the bit that one of them bought, and you find the ax that another one bought, and the hammer, or auger, or tools that another bought; and you find the cap of the one, and the overcoat of the other, and the mittens of another, all there. In their haste they have departed, and left them there. And there is the broken door, these tools with evidence that they have been used, and one or more of these parties running away is identified.

Now, you might prove those facts, and it might establish to the satisfaction of an intelligent jury that those people who bought those things were the people who were engaged in attempting to rob the postoffice. And of course, if you found them there in the evening engaged in that way,—if you had proof of those facts in regard to them, you might find—you would be justified in finding, that before they went there to rob the postoffice—before they went there to break in, that they agreed that they would do that thing. So that a conspir-

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acy might be established simply by showing the acts and conduct of the parties to it. So the Government here contends that not only by admissions, but by showing where these people were, and what they were doing, that it has established by evidence that they did conspire and agree together to do this thing—to ped-
710 dle this pamphlet, with the purpose and object to offend against the law and commit the crime charged.

Now, then, Gentlemen, in May, 1917, there was passed and approved by the President the Act known as "An Act To Authorize the President to increase temporarily the Military Establishment of the United States," and known as the Selective
711 Draft Act. And that has in it, and as a part of it, the Selective Draft Act. And it provides, among other things which have been read in your hearing,—I don't think I need to read all of it, unless one party or the other asks me to do so,—

> "All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for
712 shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be re-

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quired to serve for the period of the existing emergency unless sooner discharged."

So that the Government contends that from the time of acceptance, at least,—selection and acceptance, that those persons, even though they have not been sworn in, even tho they have not joined the colors, are in military service, and within the 714 meaning of the Espionage Act.

Now, Gentlemen, by the Act of Congress approved June 15, 1917. "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the Unitel States, and for other purposes," there was enacted this provision, 715 among others: Of course, if the defendants care to have any particular section read that I don't read, and will call my attention to it, I will read it:

"Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statemeents with intent to interfere with the operation or success of the military or naval forces of the United States 716 or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or—"

Now, here is another:

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"shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

718 And then follows the conspiracy clause, which I have already read, and do not need to read again.

Now, the Government contends that here was a conspiracy to violate that section. And it is charged in the indictment, and the Government contends, that these defendants did distribute this pamphlet "The Price We Pay." The Government contends that it did contain, and did convey, when they distributed it, false reports and false state-
719 ments, with the intent to interfere with the operation and the success of the military and naval forces of the United States. And the Government also contends that this pamphlet, and the distribution of it, was intended—that is, that it was wilfully distributed and given out, and that it was intended, and wilfully and purposely intended, to cause, or to attempt to cause insubordination
720 among persons in the service—men drafted or men already sworn in—men with the colors; that it was intended—had a tendency to, and would promote and encourage disloyalty, might produce and cause mutiny; and that it was intended to bring about refusal of duty, especially in the military and naval forces of the United States.

And also the Government contends that the

making and putting out—giving to others of such a pamphlet as that, containing the false statements, was an act that would obstruct the recruiting and the enlistment service of the United States; would encourage and lead young men not to enlist, not to recruit, etc. 721

And I think I read the particular clauses in there to which the indictment called attention. 722

Now, Gentlemen, in regard to the first alleged false statement:

> "Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;"

There arises a contention, Gentlemen, between the defendants and the Government. The Government says,—the United States, here, that that is a false statement; false on the face of it, especially in view of the testimony of the military officer who was called here, and who testified that the recruiting service was, and is, purely voluntary; that no one goes into the Army through the recruiting service except voluntarily and willingly; that there is no impressment; and that the purpose of it was to interfere and obstruct, as specified in Section 3, which I have read, and otherwise violate that section, by stirring up the mothers and the fathers, and brothers and sisters, and perhaps the young men themselves, and inducing the young men not to enlist, not to join the Army; and to urge the sons, brothers, etc., not to join. 723 724

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You have heard the contention on that subject. Now, is that statement false, or is it true, under the evidence in this case? A question of fact for you, Gentlemen; not for the Court, but for you.

Then Mr. Lucey calls attention to another:

> "You cannot avoid it; you are being dragged, whipped, lashed, hurled into it;"—the war.

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And Mr. Lucey claims that that is another false statement.

Then another statement:

> "The attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled banner is played, that he has no time to protect the food supply from gamblers."

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And Mr. Lucey contends that that is another false statement, calculated to incite opposition to the law, and defeat it,—as mentioned in Section 3.

Now, then, on that subject, Gentlemen, the United States claims to have proved that there is no law which requires anyone to stand up when the Star Spangled Banner is played. And here the Government relies on another proposition of law to show the falsity of that, and which I charge you is the law,—the Attorney General of the United States is the chief law officer of the United States—the head of the Department of Justice; and every law officer,—and other officer, for that

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matter,—law officer is applicable here to the officers of the United States,—is presumed to do his duty, and not to violate his duty. And therefore it is presumed the Attorney General did his duty, and that presumption should obtain unless there be evidence to the contrary.

I leave it as a question of fact for you. Is it proved,—the falsity of that statement? He is presumed to do his duty, and not to violate his duty. So the presumption is, in the first instance, that he has not violated the law by sending, or attempting to send anyone to prison who did not stand up when the Star Spangled Banner was played; and there is no further evidence in this case on that subject. It is for you to say. Has the Government proved the falsity of it? I leave it to you, as a question of fact for you to determine.

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Then again:

"Our entry into it—"

That is, the war—

> "was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

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Now, the United States Attorney, Mr. Lucey, says that that is a falsehood, and says that its falsity is shown absolutely by the address made by the President to Congress, in which, it is contended, he declared the purposes, and the necessities,

733 and the reasons why we entered the war; and that that shows that this statement is false and untrue.

And so the Government here says that these defendants knew these were false statements; that they were able to read, read the papers, must have read in the papers the address which the President made to Congress at the time, and that every
734 man is presumed to know the law; that they knew that nothing of this kind had occurred, and that before they put it out, if they had any question about its truth or falsity it was their duty to have made inquiry. The Government says that it is shown by their knowledge of the law—presumed to know the law,—the publications in the papers, that those statements were false and untrue. And
735 it is for you to say, Gentlemen,—Are they, or are any of them, untrue?

A part of the indictment, and the last two counts of the indictment, are based on a violation of Section 3:

> "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to inter-
736 fere with the operation or success of the military or naval forces of the United States—"

Then again another offence:

> "or to promote the sucess of its enemies—"

And then another offence:

> "and whoever when the United States is at war, shall wilfully cause or attempt to cause

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insubordination, disloyalty mutiny, or refusal of duty, in the military or naval forces of the United States—"

Then comes another:

"or shall wilfully obstruct the recruting or enlistment service of the United States, to the injury of the service or of the United States, 738
shall be punished—", etc.

So there are three different species, or kinds, of offence, each separate from the other, although the offence in the first might consist of making and giving out false reports or false statements, one or both. But there must be the "intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies"—; and then, 739
"whoever shall wilfully cause or attempt to cause insubordination". Of course that attempt must be wilful; the party doing it must know— understand, in order to make it wilful, that it would bring that result, or might; he must have that in his mind, that intent or that purpose, and intend to "wilfully obstruct the recruiting or enlistment 740
service"— It doesn't make the accidental, nor the unintentional interference a crime, but it makes the wilful act an offense. The intent there is essential. I will repeat,—that the knowledge of falsity is essential to the intent. The United States claims——When I say the United States I mean the United States Attorney——that these

741 defendants did know, and must have known the falsity of the statements complained of; that they knew what recruiting an army meant, and that recruiting did not, and could not, and would not mean or sanction, any impressment of persons of military age; that the law regulates that.

742 Now, these defendants have been upon the stand. You have heard the evidence on the part of the United States, and you have heard the evidence of the defendants—that is, their testimony, and you are to say, Did they know, or did they not? If they didn't know, why, of course they coudn't wilfully do a thing they didn't know about.

743 2,—The Government contends that the defendants knew there was no law making it an offence not to stand up when the Star Spangled Banner is played; and knew, and were bound to know, that no such law existed. That the Attorney General of the United States is presumed to do his duty, and is presumed not to violate his duty, and therefore defendants knew of the falsity of that state-
744 ment in regard to the Attorney General. And of course, there are those presumptions of law again. Have the defendants, or have they not, said they didn't know? It is for you to say, for you to judge, on all the evidence in the case.

Then 3,—The United States says that the defendants knew the war was not being waged—— that its participants were not working as one per-

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son for the accomplishment of a single end, namely, Killing, Killing,—and that everybody knew, from publications, from the papers, and the read-of the papers, and that these defendants say, some or all of them, that they did read the prominent papers, that the allies and the United States are resisting and defending for other purposes than Killing, Killing.

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So the United States says that there is another misstatement, which shows and characterizes the purpose of the defendants in putting out these circulars.

4,—The United States says that the defendants are presumed to know of the Declaration of War on the part of the United States, and knew its purpose, and that they knew the statement as to the J. P. Morgan loans to be a false statement as to the purpose and intent in entering into the war, All of that, Gentlemen, is for you, and for your determination.

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Now, Gentlemen, you have noticed therein the statute that intent is necessary,—in that first clause I have read, to which I have called your attention. Intent in doing an act, speaking words, or writing them, and conveying false statements, is made up, among other things, of what the person thinks, and desires and wishes to accomplish, or to bring about, by means of the doing of the act, or the speaking of the words, or the writing or printing, and conveying or sending out to others the

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749 false statements or reports. That is, it may be material to know what the person's ideas and principles were and are, who makes, or made, or conveys statements which are false—in getting at his intent; because his intent may be made up and determined, in part, from the condition of his mind, his desires, his purposes. So here you are to find,
750 if you can, and determine so far as disclosed, the condition of the minds of these defendants. In this case, in determining the intent of these defendants, and of each of them, in doing what you find they did do, if you find that they conveyed to others these statements, and that some of the material statements were false, you may consider whether or not the defendants all were, or each
751 of them separately was, opposed to war, opposed to the Selective Draft Act, opposed to enlistment in the Army of the United States, or the Army and Navy, one or both ;also, whether or not they were willing to make, or desirous of making, or aiding to make the prosecution of the war difficult, or to make the operation or success of the military forces difficult. The state of mind of the defend-
752 ants, and of each of them, at the time they distributed these pamphlets is therefore material in determining their intent in doing what they respectively did do. It does not determine it wholly, necessarily, but it is an item, it is a circumstance. This is a matter for your consideration and determination. The right to think what one pleases, however bad, is absolute so long as that thinking

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is not embodied and expressed in criminal acts or conduct. It is not the mere thinking that is criminal, but the forbidden act done, if it be a criminal act with the bad intent, which may be gotten at and determined by what the person doing the act actually thought, and in his mind desired to bring about or accomplish. If the thoughts and desires of the person are bad, and criminal, and he 754
is desirous of accomplishing by his acts a certain result, and that result is criminal, or forbidden by law, the act done may be colored by the thoughts, and determine the intent.

Now, considerable has been said here, Gentlemen,about a political party. Now, of course the Socialist party is not on trial here; and these defendants are not on trial because they are Socialists. 755
They are not on trial for being Socialists; but of course their political beliefs may have something to do in getting at their intent and purpose. It depends on what those political thoughts and purposes are. Political parties, and policies, and principles may legally be formed. Political parties and political principles may legally be formed, and may be a necessity under our form of 756
government. A political party, as a party, and its individual members, may lawfully and properly criticise and advocate the repeal of existing laws, and also advocate their amendment and improvement; but neither the party as a whole, nor the individual members thereof, when we are at war, may lawfully resist the execution of an existing

757 law claimed by them to be unwise, unpatriotic, oppressive or unconstitutional, or obstruct its execution by the lawful authorities charged with that duty, by means of the making, and publication, and conveyance to others of false statements calculated by their nature and character to interfere with such execution of the law, or calculated
758 to obstruct its execution, when the making and conveyance to others of such false statements is made a crime by a statute of the United States. And in this case you have heard me read the statute on that subject. But there should be a proviso to that, Gentlemen, and that is that the law as made by the duly constituted lawmaking body requires that the doing of the forbidden act must be
759 accompanied by an intent to interfere with the operation or success of the military or naval forces of the United States, or the other intent to which I have called your attention. So when the United States is at war a person, whatever his political party, or principles, or beliefs, has no right to wilfully attempt to cause, by means of false statements, either insubordination, disloyalty,
760 mutiny, or refusal of duty, in the military or naval forces of the United States. The Espionage Act makes it a crime so to act. And, of course, in this case it is for you to say, Gentlemen; it is one of the questions of fact for you to determine, the intent of these defendants, and of every one. Did they have the forbidden intent? Did they wilfully do any of the acts forbidden, to which I have called

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your attention? That means wilfully and knowingly. It is for you to say. It is for you to decide.

Now, considerable has been said here as bearing on the intent and purpose of these defendants, in regard to the holding of Judge Rose, in charging a jury and directing a verdict down in the 762
State of Maryland. The record here, Gentlemen, shows an indictment was pending against one, Romanus Baker and Jacob Wilhide, for conspiracy—now, mark you, "a conspiracy"—to interfere with, and obstruct the Selective Draft Act. That indictment was found and presented June 29, 1917. That indictment was not found under, or based upon a violation of Section 3 of the Es-
pionage Act, which is the section that I have read 763
to you,—"Whoever shall wilfully make or convey false reports or false statements with intent—", etc.,—that section. It was not found under, or based on a violation of Section 3 of the Espionage Act, the violation of which is in question here. The remarks of Judge Rose are in evidence here, and I suppose have been read to you, and were printed, and read by the defendants. 764
They claim there is noevidence that they didn't. They say they found those remarks in a paper which was printed and put out—I think about the 4th of August, 1917, which was some time after the Government contends they had voted to distribute this pamphlet "The Price We Pay." And of course, the Government contends that that is

765 very important on the question of intent. I leave that entirely to you. I will not comment on that; it is for you. The remarks of Judge Rose are in evidence here, and were printed and read by the defendants. The question of the falsity of statements in the pamphlet headed "The Price We Pay,"—if that is the pamphlet that was before
766 Judge Rose,—it is for you to say whether that is the pamphlet or not,— it is the same title, and the same heading,—it isn't quoted in the indictment, or in the remarks of Judge Rose,—it is for you to say,—was not up. That is, the question of the falsity of those statements, so far as appears, was not up, or in question, before Judge Rose. And there is nothing in his remarks made in directing
767 a verdict, nothing in the evidence here, or printed in the paper, stating or intimating that any such pamphlet contained materially false statements, and were conveyed to others with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or that it was distributed or conveyed to others to wilfully cause
768 or in an attempt to cause, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States.

Now, there is nothing there to show that the question was up, or that that case involved the falsity of those statements, and a violation of the Espionage Act. Of course, here it is argued on the part of the defendants that Judge Rose must have

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known at that time—early in July—of the Act, which was passed sometime in June, must have had it in mind; and that these defendants, in getting at the question of whether it was right or wrong, justifiable or unjustifiable on their part to put out this pamphlet, had the right to act on the authority of what Judge Rose had said; that it has a bearing on the intent, on their good faith; 770 that these defendants had the right to suppose, and think, that Judge Rose had the Espionage Act, as well as the Draft Act, in his mind. That is what the defendants contend.

Of course the Government says that these are intelligent men, and read the pamphlet; that they had a lawyer there in the Lodge; that the question as to whether they had a right to distribute 771 it had been up, and that the lawyer had advised them not to do it; and that there is no evidence that he ever advised them to do it; that the evidence is that these men, in their zeal and anxiety to put this out, to bring about the result which the Government contends was unlawful and forbidden, went ahead, of their own notion, without taking advice, or without knowing what Judge Rose 772 really decided; and that that is an aggravation of the case,— that is the contention of the Government; and that the legal effect of the false statements was not, so far as appears, in question or passed on by Judge Rose. And the United States Attorney here claims and contends that there was nothing whatever in these remarks of Judge Rose

773 which would suggest to the defendants that they, or either of them, had a right to convey to others false statements and reports with the intent to interfere with the operation or success of military or naval forces of the United States.

Now, that is a question for you, Gentlemen, after hearing all of this evidence. I tell you, Gen-
774 tlemen, as a matter of law, that there is nothing in the remarks of Judge Rose or his decision, or in the issues at that time—in that case, which amounts to a decision, or a suggestion that it would be lawful to put out the pamphlet "The Price We Pay" if it contained false statements, and if it was put out with the intent forbidden by Section 3 of the Espionage Act, to which I have
775 called your attention. And even if he so said, or decided, it would not make it the law, and I tell you it would not be good law, either,—that they would have a right to put out false statements right in the face of that Act, with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies. But there is nothing
776 there that indicates that he did so decide or hold —that they had a right to put out false statements with the intent mentioned.

Now then, Gentlemen, a person may freely express his opinions. Of course, there is a contention on the part of these defendants that they were Socialists,—and one of the defendants testified, and I think others testified in substance to the

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same, that he put out the pamphlet—or made that his purpose in putting it out, I think he said,—or reason—intent—I have forgotten just how the attorney here did phrase it, but that was the purpose of it,—that he thought putting out this pamphlet would promote Socialism, and his object was to promote Socialism. And either he, or another one, said that his object in putting out 778
this pamphlet was to increase the membership, I think. That was the substance of it,—if I get that wrong, correct me.

Now, a person may freely express his opinion as to the wisdom or the unwisdom of a law of the United States, or as to its validity, or advocate the repeal, in lawful ways and by lawful methods, of any law, and this he may do by words orally 779
spoken, or by written or printed words, in the form of pamphlets or circulars, but he has no right to counsel or advise resistance to, or assist in resisting the execution of any valid law by the duly constituted authorities or to obstruct the due execution of a valid law, or assist in so doing, by acts or false statements, or otherwise, when such resistance or obstruction is made unlawful, or an 780
offense against the United States, by an Act of Congress, duly approved. Of course, if there is no law on the subject, then a person can lawfully do it; but when there is an Act of Congress forbidding it—saying it shall not be done—why, then of course, he has no right to do it. And, Gentlemen, to place that restriction on making false state-

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ments with that intent, I charge you, as matter of law, is not a violation of that constitutional provision that freedom of speech and the press shall not be abridged, or words to that effect. And I might illustrate there,—and perhaps I had better, to make it perfectly plain what I mean.

782 You have a right to discuss, you have a right to argue, you have a right to object, you have a right to disapprove, and you have a right to make any statement as far as the United States is concerned, however false they may be, which are not forbidden by law. Of course, in states there may be some different rule. A man might come in here and say that there were twenty circles around the sun,—red, white and blue,—very distinct. It
783 might be an absolute and a bald lie. Now, there is no law that would touch him for telling that lie. You might say that is freedom of speech. Well, it would be. It is a harmless lie; it would injure nobody, nor his person, nor his property, nor his rights. If the same person should come in here and publicly and falsely say that one of your reputable citizens here had just stolen the horse
784 of his neighbor and converted it to his own use, that would be a slander. And if he should print and circulate such falsehood, it would be a libel, and he would be answerable to the law for it; not the United States law, but the State law. So as to matters pertaining to the United States, and affecting its interests and its rights. The Congress of the United States has the right to make the

promulgating of false statements and false representations unlawful, and a crime in certain cases. So I tell you here, in regard to those matters that affect the war—that touch the prosecution of it. Congress, in the exercise of its rights—constitutional powers, as the lawmaking body, has the right in certain cases to prohibit the making of false statements and the putting of them out. And in this case, as to these statements, it has undertaken so to do. So I tell you, Gentlemen, as matter of law, that Section 3 of the Espionage Act is a constitutional law, and is a valid law. No man has the right, knowingly and wilfully, to violate it, with the intent specified. Discussing, criticizing, or advocating the repeal or amendment of an existing law is one thing, while resisting or obstructing the execution of such law is quite another. Because of the middle portion of that section, Gentlemen, which makes it an offense to "wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty," "or shall wilfully obstruct"—obstruction —you see what my remarks apply to there,—

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I will begin again: Discussing, criticising, or advocating the repeal or amendment of an existing law is one thing, while resisting or obstructing the execution of such law is quite another. The first is lawful under our Constitution, and may not be prohibited by law under our Constitution; but the second, the resistance to, and the obstruction of the execution of a law by acts or false

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statements, if forbidden by Federal Law, is unlawful and may be declared a crime by Congress. Congress may make actual resistance to the execution of a law a crime; it may make it a crime to obstruct the execution of a law of the United States by acts done, and false statements made, for that purpose, and with that intent, whether
790 the false statements consists of words orally spoken, or are put in writing or print and circulated in that form, and which false statements are of a nature and character calculated to produce such result. Such a law is not an abridgment of free speech or of freedom of the press in violation of the Constitution of the United States. It is the duty of every citizen to aid in the execution of all
791 existing laws when called upon to do so by lawful authority, and also to obey such laws. No person is justified in resisting the execution, or in obstructing the execution of a valid law of the United States when such resistance or obstruction is made a crime by act of Congress, because in his opinion such law is unconstitutional. If a person for himself undertakes to decide and determine
792 the constitutionality of a law of Congress, and then knowingly and unlawfully resists its execution, or obstructs its execution, on his own judgment and opinion, or on the judgment or opinion of some other person, by acts or false statements, or both, and it is made a crime to so resist or obstruct, he does so at his peril; and his good faith, the honesty of his belief in its unconstitutionality,

793 or the unconstitutionality of the law so resisted, is no defense, if he intended to accomplish, or bring about the forbidden results—that is, the results forbidden by law,—actual prevention of the execution of such law, or the actual obstruction of its execution, if that obstruction or resistance is forbidden by law. The Espionage Act of Con-
794 gress, approved June 15, 1917, makes it a crime for a person, or persons, one or more, when the United States is at war, to wilfully make or convey false reports or false statements to others, or to another, with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies. If a person wilfully—that is, knowingly and purposely, makes up those false reports or
795 false statements and conveys them to others with such intent and purpose, he commits a crime, if it is done when the United States is at war with a foreign nation, whether such false reports and statements are successful or not; that is, whether or not the operation and success of the military and naval forces of the United States are actually interfered with, or injured. It is the making and
796 conveyance to others, or to another, of such false statements and reports, with the intent specified, that constitutes the crime, not the success that might follow their making and conveyance, or the interference that might result. This false report and statement must be a material one, and one by its nature and character calculated to interfere

797 with the operation or success of the military or naval forces of the United States or to promote the success of its enemies.

In this case the United States charges in the indictment, and insists that it has proven that various of the statements to which I have called your attention, contained in the pamphlet, which 798 each of the defendants testifies he and the other defendants conveyed to others—that is, circulated on the streets of Albany, and at various times in that City, contained materially false reports and statements of the nature which I have stated, and that such pamphlets were so circulated—that is conveyed, with intent to interfere with the operation or success of the military or naval forces 799 of the United States, by discouraging enlistments, intimidating and discouraging our soldiers, weakening or destroying the morale of our armies, and even encouraging desertion and evasion of military service and duty. The Government contends here that these false statements are so purposely interwoven with a description, and statement, and word picture, of the horrors and miseries of war 800 as to have this effect, and are such as to be well calculated to have that effect, and that such was the design, purpose and intent, not only of the composer and writer of the pamphlet, but of these defendants, and each of them, in circulating it—that is, conveying it to others with the false statements therein, and forming a part thereof.

Now then, Gentlemen, in that connection it is

801 my duty to say that these defendants have been on the stand; they deny any such purpose, they deny any such intent. You have heard them, you have seen them; and you are to consider their evidence, and their statements. The Government has put in evidence the Declaration of War,—that is, the joint resolution of Congress declaring and recognizing the existence of a state of war between 802 the United States and the Imperial German Government, approved by the President of the United States; also the Message of the President of the United States stating the cause and purpose of the war—the Government here on this trial claims that is true—states the actual causes of that war, and of that action, and the reasons why the United States entered the war, and showing this, 803 —the Government claims here,—that we, the United States, were forced into the war by the causes, and for the reasons there stated. This, the United States Attorney claims shows the falsity of the statement contained in the pamphlet "The Price We Pay," that "Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be 804 repudiated, and those American investors who bit on his (meaning Morgan) promises would be hooked."

Now, this, the United States Attorney argues, attributed a venal and an unworthy motive not only to Congress, but to the President, in urging and adopting the Declaration of war, and is a

false statement, wilfully and knowingly made, and calculated not only to interfere with the operation or success of the military or naval forces of the United States, but to encourage our enemies and promote their success. The truth or falsity of the statements which I have read is a question of fact for you, as is that of every other statement there which is claimed to be false. And I charge you in that connection, Gentlemen, that it is not necessary for the United States to prove, nor is it necessary for you to find, in order to bring about the results for which the Government contends, that all of the statements therein contained are false or untrue; only that some of them are false and untrue—some of the statements—the material ones.

And I will repeat the contention of the Government; that is, that certain of them which are false and untrue are so interwoven with statements which may be true—which are true—of which the falsity is not shown, even though exaggerated in their truth, as to make the false statement attractive, and to make them the more effective, to bring about the unlawful purpose which the United States Attorney says was intended. All of that is to be considered by you; it is to be determined by you as a question of fact. I have already told you that you are to determine whether it is false, and what the intent and purpose of the defendants was. If you find these statements here were true —or if you find that they are not proven to be

false, then that ends this branch of the case, and your verdict will be for the defendants, for on that branch of the case it rests on the falsity of those statements to which I have called your attention. If you find it was false—contained false statements of the character I have said they must be, then if wilfully conveyed—I mean conveyed by the distribution of the pamphlet to others, with intent to interfere with, or obstruct the military or naval forces of the United States,—if you find all these facts for the Government, and the falsity of other statements to which I have called your attention, then you should say guilty of this charge, provided you are satisfied of such facts beyond a reasonable doubt. 809 810

Intent is a question of fact for the jury to determine on all the evidence in the case. It is impossible for the United States to call witnesses who can testify that a defendant had a particular intent in doing a certain act, and it is not allowable to have witnesses give their opinion on that question, or subject, in behalf of the Government, or defendant, either. It is to be found or determined by the jury on all the evidence, and on consideration of all the facts and circumstances proven in the case. It is the law that a sane, intelligent person is presumed to intend the known and the natural consequences and results of his own voluntary acts knowingly done. This presumption is not conclusive, but may be rebutted by proof of other facts and circumstances tending to show 811 812

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some other intent or purpose, or that there was no intent at all in the case. The United States Attorney contends that the known, and the natural, and the inevitable consequences of making and conveying these false statements to others in the manner in which they were conveyed would be to interfere with the operation and success of the
814 military or naval forces of the United States—both of such forces, and to promote the success of its enemies; that such statements would discourage enlistments and answer to calls under the Selective Draft Act, make them more unpoplar, encourage desertion, and generally impair the morale of our armies; and that the defendants well knew this, and that they intended it. It is for you
815 to say, Gentlemen.

The defendants have testified in their own behalf; each says in substance that he thought the circulation of the pamphlet would promote socialism—the doctrine and beliefs of the Socialist party, increase its numbers and membership, and that this was their only intent. Does this pamphlet, Gentlemen, "The Price We Pay," represent
816 the ideas, belief and principles of the Socialist party? If so, is it opposed to the war, its prosecution, the Selective Draft Act, and the recruiting of the Army to carry on the war? This is a question of fact for you. This may have an important bearing in determining whether or not these defendants put out false statements, if they were false, with the intent thereby to accomplish the re-

sults to which I have called your attention. Were these defendants so opposed to war, generally, and so opposed to the present war with Germany that they were willing and ready to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies by means of false reports and statements? And if so, were they intending so to do in doing what they did, in conveying the pamphlets in question? The belief—state of mind of these defendants at the time is important in determining what their intent and purpose was. Now, Gentlemen, all of that is for you.

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Now, these defendants have testified in their own behalf, and you have heard the young man from Albany; and it is my duty to call attention to the testimony, not only of the defendants, but of that young man, the witness for the Government—the reporter; I think he said he reported sometimes; he said he was in the employ of some Agent of the United States. He said he had an interview with one of these defendants at the saloon; described what took place there,—you will remember it, it is not necessary for me to repeat it. Of course, the defendant who was there says that that conversation did not take place. He admits a part of it, but not the essential part; that he denies. Now, there is a question of credibility between those two witnesses. As to that defendant alone that is important and relevant evidence, as bearing on his intent and purpose, and his

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821 knowledge. Did he say it? Has the young man who gave the testimony been mistaken? Was he mistaken? Does he mis-remember, or does he testify falsely? You have that defendant on the one part, you have that young man on the other hand. The credibility of the two is for you. It is for you to say who told the truth. As to that defendant,
822 of course he is interested. All the defendants who took the stand are interested. Interest, as the Supreme Court of the United States has said, is a powerful motive to give false or colored testimony. That is the law. The greater the interest, the greater the motive. But that don't mean that an interested party will lie. It is a motive, that is all. How far it affects the truth and credibility,
823 is for the jury to determine. You see the witnesses; you hear their story. Is it probable, or improbable? What is their manner,—and all that? It is for you to consider, Gentlemen.

And so you saw the young man who gave the testimony. You heard what he said as to making a false statement to that defendant, and the purpose of it. Now, who told the truth? That is for
824 you. Of course, that doesn't necessarily decide the case, but it does have a strong bearing on the intent and purpose of that particular defendant. And so, Gentlemen, the same remarks as to interest apply to all of the defendants, and their testimony. As I said, interest is a powerful motive to give false or colored testimony; and as to their intent and purpose, it is for you to say and deter-

mine what it was. You are the judges of the facts. Their manner, their lives, their history,—all of that is for you to consider. And of course, as I have said before, their beliefs and disbeliefs, their knowledge of the law, and their study, their social beliefs, and all of that, is for you to consider in getting at the intent.

Now, Gentlemen, here are a number of requests.

By Mr. Taliaferro:

Will your Honor allow me to interpose one or two exceptions to Your Honor's charge at this time?

By the Court:

Yes, if you desire.

By Mr. Taliaferro:

I except to that portion of Your Honor's charge in which you undertake to give to the jury the meaning of Judge Rose's charge to the jury. I understood Your Honor to construe to the jury what Judge Rose meant by his charge.

By the Court:

No, I didn't give any meaning. I stated that he had before him an indictment for a conspiracy to obstruct or interfere with the enforcement of the Selective Draft Law. That was the indictment there. That is what he was considering; and it was in regard to that. And I stated that the question

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of false statements in the pamphlet, so far as appears, was not before him. And so far as the printed statment is concerned, the indictment shows that question was not up at all.

By Mr. Taliaferro:

To that part of Your Honor's charge, I except.

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By the Court:

What part?

By Mr. Taliaferro:

That part you just mentioned.

By the Court:

That the question of the false statements was not up at all?

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By Mr. Taliaferro:

Yes, sir.

By the Court:

Well, so far as appears. Is there anything in there that discusses that question?

By Mr. Lucy:

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If Your Honor please, the decision itself says that the truth or falsity of the statements is not in issue, or that in substance.

By Mr. Taliaferro:

My position is, that the jury is to determine that question, and the jury alone.

By the Court:

Well, I don't remember anything in there.

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If they find it there, then they will find I am wrong.

By Mr. Taliaferro:

One other exception, if Your Honor please: I except to that portion of Your Honor's charge in which you say the United States proved that there was no law requiring persons to stand up when the Star Spangled Banner is played.

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By the Court:

Well, I will modify that, Gentlemen. Maybe it doesn't prove it. The United States called Mr. Cregg, the Assistant United States Attorney, who is a lawyer, and he testified that there is no such law.

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I will withdraw my statement.

By Mr. Taliaferro:

One other: I except to that portion of Your Honor's charge in which you mentioned the fact that J. P. Morgan & Company was mentioned in "The Price We Pay." And instead of an exception, I will ask Your Honor to charge the jury that there is no evidence in this case, from beginning to end, that proves, or tends to prove, the falsity of the statement concerning J. P. Morgan in that circular.

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By the Court:

No,—I will go over that again.

Now, this pamphlet, "The Price We Pay,"

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Gentlemen, on the last page, contains this: I will read the two paragraphs preceding, and also the one following, so as to make it perfectly plain. And then I will call particular attention to the one which Mr. Lucey says is a false statement.

Now, this I am reading from the pamphlet:

838 "For this war—as every one who thinks or knows anything will say, whenever truth telling becomes safe and possible again,— This war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

It is to determine"—That is, the war—"It

839 is to determine whether interest, dividends and profits, shall be paid to investors speaking German or to those speaking English and French.

"Our entry into it"—the war—"was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors

840 who bit on his promises would be hooked."

Now, it is that statement there: "Our entry into it"—the war—"was determined by the certainty,"—an ending with "would be hooked," which Mr. Lucey claims is false.

The following, is:

"Socialism would have settled that question; it would determine that to every pro-

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ducer shall be given all the value of what he produces; so that nothing would be left over for exploiters or investors."

Now then, there is that statement. Now, I say to you, Gentlemen, that no evidence has been given that that is a true statement; but the burden as to that statement, and all other statements here,—I don't think I have mentioned that part before—the burden of proving the falsity of that statement, and the other statements in this pamphlet claimed to be false, is upon the Government. Not presumed to be false,—the burden of proving its falsity is on the Government.

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Now, Mr. Lucey claims that he has proven it to be false, and he claims that he has proven it, on behalf of the Government, to be false in this way. The statement is that:

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"Our entry into it"—meaning the entry of the United States into the war—"was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

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Now, that attributes a venal and bad motive indirectly to Congress and the President in advocating the war and approving the Declaration of War. In other words, it says here that our entry was determined by that motive and that purpose. "Now, Mr. Lucey says he has proven the falsity of that by putting in

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evidence the Message to Congress, read to Congress by the President at the time mentioned by Mr. Magee, in which the President stated the reasons why we should enter the war--the reasons why Congress should declare war. Mr. Lucey claims that those are the true and correct reasons and motives, and all of
846 the motives and reasons that led Congress—the Senate and the House in joint session—to adopt that resolution—the President to recommend and approve it.

Now, it is for you to say, Gentlemen. Is that a false statement? Has Mr. Lucey proved to your satisfaction, beyond a reasonable doubt, that that statement is false?"

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By Mr. Taliaferro:

Then I understand Your Honor refuses my request?

By the Court:

Well, what was your request?

By Mr. Taliaferro:

848 My request is, that Your Honor charge the jury that there is no evidence in this case of the falsity of the statement contained in "The Price We Pay" concerning J. P. Morgan.

By the Court:

Well, I decline to so charge. I give you an exception.

By Mr. Taliaferro:

I ask Your Honor to charge the jury on that subject, that it is a well known fact that J. P. Morgan & Company are located in New York City, and that if they believe it was within the power of the District Attorney to bring a member of that firm here to testify as to the falsity of that statement, and have failed to do so, it is a circumstance for the jury to consider.

By the Court:

"Well, I can't exactly charge that they should call anybody from J. P. Morgan & Company to testify that our entry into the war was determined by that, one way or the other; because Congress, and Congress alone, declared a state of war, and the President, and President alone, approved it. But I will tell the jury it is a question of fact for them to determine, whether that statement in there is true or false. And in determining that question they may consider whether or not the United States Attorney could have gotten anybody from J. P. Morgan & Company, or any other, or further evidence than he did, bearing upon what determined our entry into the war. If they find that he could have gotten somebody from there who would have thrown light on the subject, they may consider that. I cannot, Colonel, charge that as a matter of fact he could have done that, and

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thrown some light on it; but I charge that personally, I can't see how he could.

I decline, and give you an exception.

By Mr. Mohr:

I want to add, Your Honor, this request: That the statement in the pamphlet just re-

854 ferred to, as to Morgan & Company's loans to the allies which might have been repudiated, was an opinion which defendants had a right to hold, and to circulate, regardless of its truth or falsity, of its correctness or incorrectness, and regardless of the reasons stated either inthe President's Message or in the Declaration of War by Congress.

855 By the Court:

I can't charge that as a matter of fact. Of course, it is for the jury to say whether it is an expression of opinion or not. I will leave it to them, particularly as to that. Of course, if it is a mere expression of opinion, that is a different thing. A mere expression of an erroneous opinion isn't a false statement, if that

856 opinion is expressed in good faith.

Of course, if I should say to you, when selling you a horse, and I knew the horse had the heaves, and a ringbone, and spavin,—and I should say to you, when I knew all of that, that in my opinion that horse was perfectly sound, I think the members of the jury could find that to be a false statement, even though

857 I put it in the form of an opinion. Of course, if I didn't know, or was uncertain about it, and there was a question about it, and I said it was my opinion so and so, that would not be a false statement.

By Mr. Mohr:

858 Supposing I should change that request to a conclusion; was simply a conclusion based upon all the data at hand by the defendants, or by the writer of this pamphlet; a statement of a conclusion, and they have a right to hold it, and to circulate the pamphlet, regardless of its correctness or incorrectness.

By the Court:

859 If they had any information on the subject, and on all the information they had, they based that conclusion, and stated or circulated it, and did it honestly, that would be an opinion. Of course, that woudn't be a false statement. The Government says the defendants all have been on the stand, and they haven't given any explanation of that very circumstance—the bald assertion. My recol- 860 lection is that not one of them spoke on that subject,—did they?

By Mr. Lucey:

No, sir.

By the Court:

But I leave it with the jury, as I do all of

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the facts. It is a question of fact for them. They are to say whether that was a conclusion, or an opinion, or a statement of fact which was known to be false.

By Mr. Mohr:

Then I ask Your Honor to charge, that so
862 far as that statement is concerned, and all other statements in the pamphlet, that they were justified in accepting the statements, and conclusions, and opinions of the writer without regard to their truth or falsity, without regard to their correctness or incorrectness, and that if they circulated and accepted those opinions, passing themselves upon the
863 authenticity and reliability of the source, that they were without fault.

By the Court:

I decline to so charge, and give you an exception.

The defendants say they distributed this pamphlet. "Unless they knew, or were informed that the statements contained therein
864 were true, it was their duty, in view of the common knowledge, to make some investigation before putting it out. When they put it out, they adopted it. It may have been their duty to have someone make some investigation, and get some information as to whether it was true or false, in view of all the information they had and the conditions surrounding

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them. It is for the jury to say—to find whether or not they were justified in putting it out without any injury, or any actual knowledge on the subject. I have already charged the jury that they must have known it was false from their general knowledge, or otherwise, and I repeat that charge."

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By Mr. Mohr:

We except to that.

I would like to ask Your Honor to charge the jury, that the jury have the right to regard the statements made in said pamphlet as to the Attorney General sending men to prison for not standing up when the Star Spangled Banner is played, as a mere figure of speech, meaning that he gave his time to trivial, or unimportant matters, while he neglected large matters of public moment.

867

By the Court:

Well, I am asked to charge that the jury has a right to do it. Yes, they have the power to do it, and I charge they have a right to do it. Is that the fair meaning, or is it a bald assertion?

868

Mr. Mohr requests.

I ask a charge that persons selected by the Selective Draft Act of May 18, 1917, before being called to the colors,—is what you mean—are not within the language of Section 3 of the Espionage Act,—a part of the

869 naval and military forces of the United States.

"All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance,"—when they are accepted finally—af-
870 ter the examination and final acceptance—
"be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to
871 serve for the period of the existing emergency unless sooner discharged:"

"Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and
872 whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States,"—

Well, what do you say, Mr. Lucey?

By Mr. Lucey:

I haven't paid enough attention to the re-

873

quest, Your Honor, to know what the request is.

By the Court:

Well, I have charged particularly on that subject.

"All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance,"— 874

That is, that means after their acceptance; after the examination and acceptance, I take it.

"be subject to the laws and regulations governing the Regular Army,"— 875

Now, Mr. Mohr asks me to charge that after they have been accepted—drafted, and examined, and accepted, and become subject to the laws and regulations governing the Regular Army, that still they are not part of the military or naval forces of the United States, within the meaning of Section 3 of the Espionage Act. 876

By Mr. Lucey:

Does it say that after they have been accepted they are not of the military forces?

By the Court:

He wants me to charge that they are not.

877

By Mr. Mohr:

Not until they have been accepted; the mere fact of the draft.

By the Court:

Oh, the mere fact of the draft. Oh, I so charge. But the point is,—after they are examined under the rules and regulations, and
878 accepted, and have become subject to the laws of the Regular Army rules and regulations of the Regular Army,—I thought that was what you wanted me to charge.

By Mr. Mohr:

That is practically what I do. There is no evidence in this case that any person had re-
879 ceived a pamphlet who had been accepted by the Regular Army.

By the Court:

That has nothing to do with it. It isn't whether anybody was actually induced.

By Mr. Taliaferro:

If Your Honor please,—one other instruction that I omitted.

880 My client requests that Your Honor charge the jury, that if the defendants, on or about the 12th day of July, 1917, read a newspaper item in a newspaper called "The New York Call," to the effect that it had been decided by a Federal Court Judge at Baltimore, in a case before him, that the distribution of the paper called "The Price We Pay" was legal,

881

,then they were justified in circulating that paper.

By the Court:
I decline to so charge.

By Mr. Taliaferro:
We except.

882

By Mr. Lucey:

Perhaps right in that connection, Your Honor, it would be well to call attention to the fact that in that Baker-Wilhide indictment the overt act is set forth as having occurred on the 2nd day of June.

The Espionage Act was passed and approved on the 15th day of June.

883

By the Court:

That charge related to matters charged in the indictment, which occurred prior to the passing of the Espionage Act?

By Mr. Lucey:

Yes, sir; and the Espionage Act didn't apply to the act they committed on the 2nd of June.

884

By the Court:

The matter on trial was a violation of the Selective Draft Act; not the Espionage Act, at all.

By Mr. Taliaferro:

I concede that. I never contended for anything else.

885

By the Court:

That paper, "The Call," wasn't dated till when?

By Mr. Taliaferro:

12th day of July; the day after the meeting when they passed a resolution not to circu-

886 late that paper.

By Mr. Taliaferro:

In order that Your Honor may have before you just the words of the Judge, he says:

"But the one thing the jury is to inquire into is not as to the wisdom or the lack of wisdom of any statements in those circulars, or their truthfulness or their fairness."

887 But he excluded the question of truthfulness from their consideration.

By the Court:

That is all in the charge that he made as it was printed in both of those papers; but that would only have a bearing on their intent and purpose.

888 I am requested by the defendants to charge these requests:

"The Government must establish beyond a reasonable doubt, that the statements in this circular, "The Price We Pay," are false."

As worded there, I refuse to so charge. What I do charge is, that it is not necessary for the Government to have proven the falsity

of all the statements contained in that pamphlet; it is only necessary that it shall prove the falsity of two or more of the statements—of the material statements contained therein; statements so material that it would have produced, or had a tendency—a legitimate tendency to bring about the result claimed; taking it all together, in connection with the other matter.

By Mr. Mohr:

And that proof must be beyond a reasonable doubt, as to those matters.

By the Court:

Certainly. All facts on every material point must be established beyond a reasonable doubt. Every thing that the Government has to prove must be proved beyond a reasonable doubt; everything that is material and necessary.

"The Government must establish beyond a reasonable doubt that the defendants believed these statements to be false, and that their distribution of them was wilfull."

That I decline to charge, as there written,—about their belief. I have already charged, and charge again: The Government must prove beyond a reasonable doubt that the defendents knew the statements, or some of them, to be false. Of course, the distribution must have been wilful. I have stated that

893

over and over again,—and with that intent.

"The Government must establish beyond a reasonable doubt that when these men, either collectively or individually, distributed these circulars that they expected and intended that the effect and result of its reading upon the minds of its readers would be to cause insur-

894 rection, disloyalty, mutiny, or refusal of duty; or would result in obstructing the recruiting or military service of the United States, or that they were made with intent to interfere with the operation and success of the military and naval forces of the United States."

Well, it wasn't necessary that they expect-

895 ed and intended that they would have that effect on the minds of all readers. If they intended it to have that effect on the minds of some, and didn't suppose it would have that effect on all,--why, of course, if that was their intent and purpose, if it was proved beyond a reasonable doubt, they could be found guilty. It wasn't supposed it would have

896 that effect on every man or woman.

By Mr. Mohr:

"Should the jury find that the Government has failed to establish beyond a reasonable doubt any one of the above facts, then it will be their duty to acquit the defendants, or such of them as they fail to find all these facts against."

897

By the Court:

That would be true as to the last two counts submitted,—that is, with the classification I have made.

By Mr. Mohr:

"Should the jury find simply that a possible effect of the reading of this pamphlet 898
might result in all, or some of the consequences set forth in the statute, that fact alone is not sufficient to convict these defendants; they must find the further fact that it was in the minds of defendants, and each of them, to produce these effects, and the Government must prove that fact beyond a reasonable doubt."

899

By the Court:

Why, that is true, applying it to each defendant separately. Of course, it must have been the intent. But that may have been in the minds of all the defendants but one, and not that one; it may have been in the minds of two, and not all three; but when the necessary intent and purpose was present, a man, so far 900
as that is concerned, is guilty. In order to find one guilty who had the necessary intent and purpose, it isn't necessary to find the others had the same intent and purpose,—the way you have drawn it there. If you take the last two counts there; this don't have anything to do with the conspiracy.

901

By Mr. Mohr:

The new matter in that charge, Your Honor, is those two lines.

By the Court:

If they find nothing more to it except the possible reading of it, that might be possible to discourage enlistment, or to bring about
902 opposition, or to interfere with the operation or success of the military service, why, that wouldn't make them guilty. There, all that is necessary is to wilfully make or convey a false report or false statement with intent to interfere with the operation or success of the military or naval forces of the United States.

Now, if they put forth a false statement—
903 material—calculated to bring about that result, with that intent, and the jury are satisfied of that beyond a reasonable doubt, that man—or those men who did that are guilty. If they are proven guilty, it is entirely immaterial whether it did have that result; whether it did interfere with the operation or success, or not. If they put it out, and it
904 was false, and they knew that—intended that result, and if it was of a nature that might produce that result, then they are guiilty,—if that is proved beyond a reasonable doubt.

Now you come down there lower, to the next one,—referring to the statute:

"and whoever, when the United States is at war, shall wilfully"—

905

Now, you can't do a thing wilfully unless you do it knowingly.

"shall wilfully" That is, purposely—

"cause or attempt to cause insubordination"—

Now, then, if the defendant, or all the defendants, putting out that pamphlet, with those statements,—if they intended in putting 906
it out, to cause insubordination, or mutiny, or refusal of duty,—if that was their intent and purpose, then they are attempting to cause refusal of duty, whether it succeeded or not. And if the pamphlet is of a nature which would have a tendency naturally to bring about that result, and they put it out for the purpose of doing it, then it is an attempt to 907
cause refusal of duty, and it isn't necessary that it influenced a single person, if it is of the nature that will, or naturally would—probably would,—if they put it out with that intent, and it is false, and they knew it, why, then there is an intent to bring about a refusal of duty.

Have I made that plain, Mr. Lucey? 908

By Mr. Lucey:

That is perfectly clear to me, Your Honor I think you have cleared it up to the jury better now, than you did in your first statement to the jury.

By the Court:

This last clause here (referring to the stat-

909 ute) has to do with the conspiracy only.

Well, that I charge as it is written there.

"I charge you, that even if you should find that false statements were contained in the slips of papers distributed by the defendants, entitled "The Price We Pay," still the defendants cannot be convicted unless you find

910 beyond reasonable doubt that they distributed the same with intent to interfere with the operation or success of the military or naval forces of the United States."

I think I have charged that. I charge it, and I think that is a mere repetition of what I have charged.

911 By Mr. Mohr:

It is, Your Honor, a mere repetition.

By the Court:

Yes, that is what I have charged, and I charge it again.

"The Constitution guarantees the right of the freedom of speech and of the press, and under this"—

912 I want you to understand, Gentlemen, I am reading here what they ask in a request to charge; not what I say.

"Constitutional guarantee that the defendants had the right to distribute the paper called "The Price We Pay."

I decline to charge that. They didn't have any right to give it out to others—convey it to

913

others, if it contained false statements, and they knew it. They didn't have any right to do it simply because the Constitution permits free speech. If it contained false statements, and they had the bad intent, and it was of the character described, then of course it was forbidden by law, and constitutionally forbidden.

914

"In considering the fact of the state of mind of the defendant the jury must not let their own opinion of the pamphlet influence them whatever. They must find that fact from the evidence, and the evidence alone."

Why, certainly. You are to determine what the defendants thought, what the defendants believed, what the intent of each of the de- 915
fendants was. Of course, you look at it, you read it, refer to this evidence,—then you have got your own common sense to aid you and guide you; all together, and from all the evidence and testimony in the case, and the pamphlet itself, and the reading of it, say what the intent and purpose of the defendants was, what their understanding of it was.

916

"The mere fact that the reading of this circular might make a possible volunteer in the recruiting service less likely to enlist, or should cause him to decide not to enlist"—

You mean should, or would, or might?

By Mr. Mohr:

Might.

917

By the Court:

"decide not to enlist, must not be construed as against these men as wilfully obstructing the recruiting and enlistment service of the United States to the injury of the service of the United States."

Well, I guess that is plain to the jury. Yes,
918 the defendant asks me to charge that "The mere fact that the reading of that circular might cause a possible volunteer in the recruiting service—one who would have volunteered, but for reading—less likely to enlist, or to cause him to decide not to enlist, is not to be construed, as far as these defendants are concerned, as a wilful obstruction on their
919 part, of the recruiting and enlistment service."

I think that is what you mean, isn't it?

By Mr. Mohr:

Precisely, yes, sir.

By the Court:

Oh, that is true, of course. The mere fact that it might do it in one case,—it must have
920 been their intent and purpose to do that.

"To obtain converts to the Socialist program and members for the Socialist party is a lawful motive, or object."

Well, so far as appears here, yes.

"If the jury can explain the acts of the defendants by attributing to them the motive that they sought to obtain converts to the

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Socialist program or members of the Socialist party, or either of such purposes, as well as by attributing to them and to these acts the unlawful objects set forth in Section 3 of the Espionage Law, it is your duty to find such objects to be their intent, and to acquit the defendants."

Well, those charges of conspiracy, or the last two submitted? 922

By Mr. Mohr:

I make that request, Your Honor, on the rule that if a good motive, or a lawful motive, or an unlawful motive, might equally be attributed to explain any of said acts, that it is the duty, and principle of law, to believe the good motive—the lawful motive. 923

By the Court:

Why, of course, Gentlemen, if on the evidence in the case, where the question is one of intent, or motive, if the evidence is just as consistent with a good motive for the act as it is with a bad motive then it is the duty of the Court and jury, both, to give the defendants the benefit of the doubt, and attribute to them 924 the good motive, or good intent.

Is that what you mean?

By Mr. Mohr:

Yes, sir.

By the Court:

"Every citizen of the United States has a

925

legal right to have, and to express an opinion against the approval of any proposed or pending legislation, and to have an express an opinion favoring the repeal or modification of any law after it has been approved and adopted."

Haven't I charged fully enough on that?

926

By Mr. Taliaferro:

Yes, I think you have.

By the Court:

I will read it again, if you want me to. Of course, I have told you, Gentlemen, that every man has a right to discuss the law as it exists, and a right to criticize it in a reasonable

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and proper way; he has a right to advocate its repeal, or even its amendment, and its change—improvement. That is a right. But I told you at the same time, that he don't have any right to resist it; that is, to oppose in the sense of a physical resistance; doesn't have any right to resist its execution, doesn't have any right to obstruct its execution by

928

proper persons. And he has no right to obstruct its execution in any way if forbidden or by false statements—if Congress has passed a law making it an offense to obstruct or resist by putting out false statements and reports.

"Every citizen has the right to have and express any opinion opposed to the principle

929

of conscription, either before or after the enactment of the Selective Draft or Conscription Act approved on the 18th day of last May."

You mean a legal right, of course,—you are talking about?

By Mr. Mohr:

930

Yes.

By the Court:

Yes,—express an opinion.

"During the period covered by this indictment, every citizen had the right to criticize the Government and its policies, including the Government's declaration of war against Germany. He had a right to oppose conscription as a governmental policy."

931

Well, you don't mean physically oppose it; you mean by argument. Yes.

"He had a right to use all lawful means and efforts, either in connection with a political party or as an individual, to secure the repeal of the conscription law or to assist in protesting against the continued existence of such law."

932

That is true. Of course, he don't have a right to oppose it, or resist its execution, or obstruct its execution, by putting out false statements, with intent to interfere with the operation or success of the military or naval forces. As it is stated there, that is true.

933

"There is nothing unlawful in the simple circulation of these pamphlets either singly or collectively by these defendants."

Oh, there wouldn't be anything unlawful in the simple circulation of them. It would have to be done with the intent to interfere with the operation or success of the military or
934 naval forces of the United States or to promote the success of its enemies.

By Mr. Mohr:

Your Honor, omit 14 and 15. You have already stated in substance of them. If you will go to 16, down to the bottom of the page.

By the Court:

You waive 15?

935

By Mr. Mohr:

Yes, waive 14 and 15.

By the Court:

"that if the defendants had information which they believed to be true, to the effect that Judge Rose, at Baltimore, in a case pending before him held the distribution of "The
936 Price We Pay" to be legal and in violation of no law, and if they honestly relied upon this information, and honestly believed such decision protected them in distributing the document, then they cannot be convicted, it matters not whether the charge of Judge Rose was in a case under the Selective Draft Act, or of the Espionage Act."

937

Oh, that is true, as a matter of course. I have charged that.

"That the Constitution of the United States conferred no power upon Congress to pass the Selective Draft Act, approved May 18, 1917."

That I refuse to charge.

"That the Constitution conferred no power upon Congress to pass the Espionage Act, ap- 938
proved June 15, 1917."

That I refuse to charge, and give you an exception. Where I refuse your request I give you an exception.

On the contrary, Gentlemen, I charge you that the Constitution of the United States does confer power upon Congress to pass the Selective Draft Act as it did and that it is a 939
lawful act.

And I charge you that the Constitution conferred the power upon Congress to pass the Espionage Act, passed June 15, 1917, to which I have called your attention, and that it is a valid act.

And to that charge I give you an exception.

Anything further, Gentlemen? 940

By Mr. Taliaferro:

Nothing further from the defendant.

By the Court:

Anything, Mr. Lucey?

By Mr. Lucey:

No, sir. I think Your Honor has covered the ground very fully.

941

By the Court:

You don't want to confuse, now, Gentlemen, what we have been saying here in the last part of the charge with these two first counts of conspiracy.

If you find that the defendants conspired—that is, agreed together—had a common un-
942 derstanding, that they would violate a criminal law of the United States as charged, and then either one of the defendants if that agreement existed, did any act, however innocent it was of itself, to carry it into effect, then you are to say guilty. When you come to the other, you have got to find these facts as stated. As I told you before, to find them
943 guilty under the conspiracy count it isn't necessary to find that the conspiracy was successful. That is, Mr. Mohr and I might conspire to steal your horse. Now, if that is our intent and purpose, and we agree to do it, if he goes and gets a crowbar to pry open the door to the stable, and I go and get the crowbar and bring it over here, and then we don't do
944 anything further,—now, there we conspired; I have done something in execution,—one of us, and the crime of conspiracy is complete. It isn't necessary to go and steal the horse.

By Mr. Mohr:

At that point I want to ask the Court to charge, that the mere buying of the crowbar —the mere performance of the innocent act—

945

will not in itself constitute a fact from which they may infer conspiracy.

By the Court:

Oh, no ;there has got to be some evidence of the conspiracy.

Then if we started out, and should take the crowbar and try to pry the door open, and 946
somebody should see it going on, and then we finally got the door open, and tried to get the horse out, and somebody interfered why then the jury might find that we had conspired, even if they were not present at the time we did conspire.

By Mr. Mohr:

There would have to be an agreement—an 947
act accompanying the overt act; if there was simply an act—the buying of the crowbar—there would have to be an agreement, in order to establish the criminal intent.

By the Court:

Oh, yes. They would have to show there was an agreement, and that something was done to that end,—yes. 948

Well, anything further?

By Mr. Mohr:

That is all.

Whereupon the jury retired and brought in a verdict finding the defendants, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman guilty as charged

949

in the 1st, 2nd, 3rd and 6th counts of the indictment and the defendant Charles Nelson guilty of the offense charged in the 3rd count of the indictment.

The defendants, by their attorney Frederick A. Mohr, thereupon moved the Court to set aside the verdict on the ground that it was against the evi-
950 dence as a matter of law and against the weight of evidence, but the Court overruled the notion to which the defendants then and there by their counsel duly excepted.

Thereupon the Court entered judgment upon the verdict and sentenced the defendant Clinton H. Pierce to the Albany County Jail for the term of ten months and that he pay a fine of Five Hun-
951 dred Dollars.

That the defendant, Angelo Creo, be imprisoned in the Albany County Jail for the term of one year and pay a fine of Six Hundred Dollars.

That the defendant, Charles Z. Zeilman be imprisoned in the Albany County Jail for the term of eight months and pay a fine of Five Hundred Dollars.

952 That the defendant, Charles Nelson be imprisoned in the Albany County Jail for the term of four months and pay a fine of Fifty Dollars.

Each defendant was separately sentenced on each Count on which found Guilty but the sentences were to run concurently

953

STIPULATION AS TO CERTAIN PUBLIC DOCUMENTS USED AS EXHIBITS.

UNITED STATES DISTRICT COURT

for the

954

NORTHERN DISTRICT OF NEW YORK.

CLINTON H. PIERCE, ANGELO CREO, CHARLES S. ZEILMAN, and CHARLES NELSON.

Plaintiffs-in-Error,

against

955

THE UNITED STATES OF AMERICA,

Defendant-in-Error.

It is hereby stipulated that the copies of public documents, consisting of Addresses, Resolutions, Proclamations, Laws, Rules and Regulations, offered in this case, as Exhibits A, B, C, D, E, F, G, and H, be designated by proper reference and title in lieu of printing the text of the same. 956

DENNIS B. LUCEY,
Attorney for Defendant-in-Error.

FREDERICK A. MOHR,
Attorney for Plaintiff-in-Error.

957

GOVERNMENT'S EXHIBIT A.

Congressional Record of Monday, April 2, 1917, volume 5500, No. 1, commencing on page 2 and ending on page 4, headed "Address by the Presi-
958 dent of the United States—Portion admitted in evidence, beginning 2d column of page 2, ending with the words, "God helping her she can do no more" page 4.

GOVERNMENT'S EXHIBIT B.

959 Certified copy of the Joint Resolution declaring war between the United States and the Imperial German Government offered in evidence and marked Exhibit B.

GOVERNMENT'S EXHIBIT C.

960

The Act known as the Espionage Law, passed June 15th, 1917, (H. R. 291 Pub. 24) being an act to punish " acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, the better to enforce the laws of the United States,and for other purposes."

961

GOVERNMENT'S EXHIBIT D.

Act of May 18th, 1917, headed Pub. No. 12, H. R. 3545, being an act to authorize the President to temporarily increase the military establishment of the United States.

962

GOVERNMENT'S EXHIBIT E.

Proclamation of the President Relating to Alien Enemies issued April 6th, 1917, after the passing of the Joint Resolution by Congress on the same day declaring that a state of war exists. 963

GOVERNMENT'S EXHIBIT F.

Proclamation of the President dated May 18th, 1917, designating June 5, 1917 as Registration day.

964

GOVERNMENT'S EXHIBIT G.

First Registration Regulations prescribed by the President under authority of the act approved May 18th, 1917.

965

GOVERNMENT'S EXHIBIT H.

Act of August 10th, 1917, with reference to Conservation of Food Pub. 41-65 Congress H. R. 4961.

Also Acts of June 3d, 1916, in reference to reorganization of the Army and that of July 16, 1916

966 in the bound official volume Chapter 225, "an act making appropriations for fortifications and armament thereof; for the procuring of heavy ordnance for trial and for service and for other purposes."

967

GOVERNMENT'S EXHIBIT I.

THE PRICE WE PAY.

By Irwin St. John Tucker.

I.

Conscription is upon us; the draft law is a fact!

Into your homes the recruiting officers are com-

968 ing. They will take your sons of military age and impress them into the army;

Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

969

Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve 970
their lungs; every pang will be multiplied in its passage to you.

Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

And still the recruiting officers will come; seiz- 971
ing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

And still the toll of death will grow.

Let them come! Let death and desolution make barren every home! Let the agony of war crack every parent's heart! Let the horrors and miseries of the world-downfall swamp the happiness of 972
every hearthstone!

Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!

973

II.

Yesterday I saw moving pictures of the Battle of the Somme. A company of Highlanders was shown, young and handsome in their kilts and brass helmets and bright plaids.

They laughed and joked as they stood on the
974 screen in their ranks at ease, waiting the command to advance.

The camera shows rank after rank, standing strong and erect, smoking and chaffing with one another;

Then it shows a sign: "Less than 20 per cent. of these soldiers were alive at the close of the day."

Only one in five remained of all those laddies,
975 when sunset came, the rest were crumpled masses of carrion under their torn plaids.

Many a highland home will wail and croon for many a year, because of these crumpled masses of carrion, wrapped in their plaids, upon a far French hillside.

I saw a regiment of Germans charging downhill against machine gunfire. They melted away like snowflakes falling into hot water.

976 The hospital camps were shown, with hundreds and thousands of wounded men in all stages of pain and suffering, herded like animals, milling around like cattle in the slaughter pens.

All the horror and agony of war were exhibited; and at the end a flag was thrown on the screen and a proclamation said: "Enlist for your Country!" The applause was very thin and scattering; and

977

as we went out, most of the men shook their heads and said:

"That's a hell of a poor recruiting scheme!"

For the men of this land have been fed full with horror during the past three years; and tho the call for volunteers has become wild, frantic, desperate; tho the posters scream from every billboard, and tho parades and red fire inflame the 978
atmosphere in every town;

The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say "Must we—be that!"

You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay; 979

It is the price you pay for your stupidity—you who have rejected Socialism.

III.

Food prices go up like skyrockets; and show no sign of bursting and coming down.

Wheat, corn, potatoes, are far above the Civil War mark; eggs, butter, meat—all these things 980
are almost beyond a poor family's reach.

The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.

Starvation begins to stare us in the face—and

981 we, people of the richest and most productive land on earth are told to starve ourselves yet further because our allies must be fed.

Submarines are steadily sending to the fishes millions of tons of food stuffs; and still we build more ships, and send more food, and more and more is sunk;

982 Frantically we grub in the earth and sow and tend and reap; and then as frantically load the food in ships, and then as frantically sink with them—

We, the "civilized nations" of the world!

While the children of the poor clamor for their bread and the well to do shake their heads and wonder what on earth the poor folks are doing;

983 The poor folks are growling and muttering with savage sidelong glances, and are rolling up their sleeves.

For the price they pay for their stupidity is getting beyond their power to pay!

IV.

984 Frightful reports are being made of the ravages of venereal diseases in the army training camps, and in the barracks where the girl munition workers live.

One of the great nations lost more men thru loathsome immoral diseases than on the firing line, during the first 18 months of the war.

Back from the Mexican border our boys come, spreading the curse of the great Black Plague

985

among hundreds of thousands of homes; blasting the lives of innocent women and unborn babes,

Over in Europe ten millions of women are deprived of their husbands, and fifty millions of babies can never be;

Of those women who will have their mates given back to them, there are twenty millions who will have ruined wrecks of men; mentally derang- 986
ed, physically broken, morally rotten;

Future generations of families are made impossible; blackness and desolation instead of happiness and love will reign where the homes of the future should be;

And all because you believed the silly lie, that "Socialism would destroy the home!"

Pound on, guns of the embattled host; wreck 987
yet more homes, kill yet more husbands and fathers, rob yet more maidens of their sweethearts, yet more babies of their fathers;

That is the price the world pays for believing the monstrous, damnable, outrageous lie that Socialism would destroy the home!

Now the homes of the world are being destroyed; every one of them would have been saved by 988
Socialism. But you would not believe. Now pay the price!

989

V.

This war, you say, is all caused by the Kaiser; and we are fighting for democracy against autocracy. Once dethrone the Kaiser and there will be permanent peace.

That is what they said about Napoleon. And in
990 the century since Napoleon was overthrown there has been more and greater wars than the world ever saw before.

There were wars before Germany ever existed; before Rome ruled; before Egypt dominated the ages.

War has been universal; and the cause of war is always the same. Somebody wanted something
991 somebody else possessed and they fought over the ownership of it.

This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;

"Get ready for the commercial war that will fol-
992 low this war."

Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

And as soon as the guns are stilled and the dead are buried, commercial forces will prepare for the next bloody struggle over routes and ports and rights, coal mines and railroads;

993

For these are the essence of this, as of all other wars!

This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

994

But go to it! Believe everything you are told—you always have, and doubtless always will, believe them.

Only do retain this much reason ;when you have paid the price, the last and uttermost price; and have not received what you were told you were fighting for—namely Democracy—

Then remember that the price you paid was not the purchase price for justice, but the penalty price for your stupidity!

995

VI.

We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely killing.

996

Every man, every women, every child, must "do his bit" in the service of destruction.

We have been telling you for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity but you have laughed at us.

Now you call every person traitor, slacker, pro-

997 enemy who will not go crazy on the subject of killing; and you have turned the whole energy of the nations of the world into the service of their kings for the purpose of killing—killing—killing.

Why would you not believe us when we told you that it was possible to cooperate for the saving of life?

998 Why were you not interested when we begged you to work all together to build, instead to destroy? To preserve, instead of to murder?

Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellowworkers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

999 Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded—you are paying for them now.

—Lo, the price you pay! Lo, the price your children will pay. Lo, the agony, the death, the blood, the unforgettable sorrow,—

The price of your stupidity!

For this war—as every one who thinks or
1000 knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

It is to determine whether interest, dividends and profits shall be paid to investors speaking

1001

German or those speaking English and French.

Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked.

Socialism would have settled that question; it would determine that to every producer shall be 1002
given all the value of what he produces; so that nothing would be left over for exploiters or investors.

With that great question settled there would be no cause for war.

Until the question of surplus profits is settled that way, wars will continue; each war being the prelude to a still vaster and greater outburst of 1003
hell;

Until the world becomes weary of paying the stupendous price for its own folly;

Until those who are sent out to maim and murder one another for the profit of bankers and investors determine to have and to hold what they have fought for;

Until money is no more sacred than human 1004
blood;

Until human life refuses to sacrifice itself for private gain;

Until by the explosion of millions of tons of dynamite the stupidity of the human race is blown away, and Socialism is known for what it is, the salvation of the human race;

1005

Until then—you will keep on paying the price!

IF THIS INTERESTS YOU, PASS IT ON.

* * * * * * * *

Subscribe to The American Socialist, published weekly by the National Office, Socialist Party, 803 West Madison Street, Chicago, Ill., 50 cents per year, 25 cents for 6 months. It is a paper without

1006 a muzzle.

* * * * * * * *

Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

* * * * * * * *

To the National Office, Socialist Party, 803 W. Madison St., Chicago, Ill.

1007 I am interested in the Socialist Party and its principles. Please send me samples of its literature.

Name.....

Address.....

City.....State.....

1008 **Government's Exhibit K** (consisting of certified copy of Judge Rose's remarks in the Baker-Wilhide ruling on the admissibility of testimony, identical with defendants' Exhibit 5) except that the fact at folio ——, page 265, reads as follows:

"The one sole question in this case is, whether these men, in anything they did, intended to persuade men not to register under the draft, or after they were registered to persuade them not to obey orders or come to the colors."

1009

GOVERNMENT'S EXHIBIT L.

UNITED STATES OF AMERICA
vs.
ROMANUS E. BAKER
and
JACOB M. WILHIDE. 1010

In the District Court of the United States for the District of Maryland.

The Grand Inquest of the United States of America in and for the District of Maryland, inquiring for the body of said District, do on their oath present that on the eighteenth day of May 1011
in the year of our Lord Nineteen hundred and seventeen, the President of the United States of America, duly issued his Proclamation as provided by the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase the military establishment of the United States," in which said Proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the 1012
several states and in the District of Columbia, in accordance with the said Act of Congress approved May 18, 1917, that the time and place of such registration shall be between 7 a. m. and 9 p. m., on the fifth day of June in the year of our Lord nineteen hundred and seventeen, at the registration place in the precinct wherein they may

1013

have permanent homes; that those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day therein named are required to register, excepting only officers and enlisted men of the regular Army, the Navy, the Marine Corps, and the National Guard and Naval Militia, while
1014 in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further present that ROMANUS E .BAKER and JACOB M. WILHILDE, (hereinafter referred to as the defendants), both
1015 late of the City of Hagerstown, in the State of Maryland and District aforesaid, heretofore, to wit, on the eighteenth day of May in the year of our Lord nineteen hundred and seventeen, and on each and every day thereafter up to and including the date of the finding of this Indictment, at Hagerstown aforesaid, did unlawfully, wilfully, knowingly and feloniously conspire, combine, confed-
1016 erate and agree together, and with divers other persons whose names are to the Grand Inquest aforesaid unknown, to commit an offense against the United States, that is to say, the said defendants unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together, and with divers other persons whose names are to the Grand Inquest aforesaid

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unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President and other public notice given by him and by his direction stating the time and place of such registration, being under the duty as persons of the designated 1018
ages, except officers and enlisted men of the Regular Army, the Navy and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress approved May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United 1019
States," should unlawfully and wilfully fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress approved May 18 ,1917.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further present that the said defendants, ROMANUS E. BAKER and JACOB M. WILHIDE, unlawfully, wilfully, knowingly 1020
and feloniously did conspire, combine, confederate and agree together, and with divers other persons whose names are to the Grand Inquest aforesaid unknown, to aid, abet, counsel, command, induce and procure divers persons whose names are to the Grand Inquest unknown, the same being male persons between the ages of twenty-one and

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thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President and other public notices given by him and by his direction stating the time and place of such registration, being under the duty as persons of the designated ages, except officers
1022 and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provision of the Act of Congress approved May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," unlawfully and
1023 wilfully to fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress approved May 18, 1917;

And in pursuance of and to effect the object of said unlawful conspiracy, combination, confederation and agreement, the said ROMANUS E. BAKER, heretofore, to wit, on the second day of
1024 June, in the year of our Lord Nineteen hundred and seventeen, at Hagerstown aforesaid, did give away and distribute to divers persons whose names are to the Grand Inquest aforesaid unknown copies of a certain printed circular, handbill, and pamphlet, too voluminous to be set forth in this indictment, and beginning with the words, to wit, "The Price We Pay," and ending with the words

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to wit, "Please send me samples of its literature. Name—Address—City—State—";

And in pursuance of and to further effect the object of said unlawful conspiracy, combination, confederation and agreement, the said ROMANUS E. BAKER, heretofore, to wit, on the second day of June, in the year of our Lord nineteen hundred and seventeen, at Hagerstown aforesaid, did 1026
give away and distribute to a certain person, to wit, one William J. Purdy, a certain printed circular, hand-bill, and pamphlet, too voluminous to be set forth in this indictment, and beginning with the words, to wit, "The Price We Pay," and ending with the words, to wit, "Please send me samples of its literature. Name—Address—City—State." 1027

And in pursuance of and to further effect the object of said unlawful conspiracy, combination, confederation and agreement, the said JACOB M. WILHIDE, heretofore, to wit, on the second day of June, in the year of our Lord nineteen hundred and seventeen, at Hagerstown aforesaid, did give away and distribute to divers persons whose names are to the Grand Inquest aforesaid un- 1028
known, copies of a certain printed circular, hand-bill, and pamphlet, too voluminous to be set forth in this indictment, and beginning with the words, to wit, "The Price We Pay," and ending with the words, to wit, "Please send me samples of its literature. Name—Address—City-State—";

And in pursuance of and to further effect the

Government's Exhibit L

1029

object of said unlawful conspiracy, combination, confederation and agreement, the said JACOB M. WILHIDE, heretofore, to wit, on the second day of June, in the year of our Lord nineteen hundred and seventeen, at Hagerstown aforesaid, did give away and distribute to a certain person, to wit, one Charles A. C. Ohler, a certain printed circu-
1030 lar, hand-bill, and pamphlet, too voluminous to be set forth in this indictment, and beginning with the words, to wit, "The Price We Pay," and ending with the words, to wit, "Please send me samples of its literature. Name—Address—City—State—" ;contrary to the form of the statute in such case made and provided, and against the peace, government and dignity of the United
1031 States.

SAMUEL K. DENNIS,
United States Attorney.

1032

Government's Exhibit L

1033

Act May 18, 1917—Sec. 5.
Penal Code, Sec. 37 & 332.

The foregoing indictment endorsed:

A True Bill,

GEO. P. NEILSON,
Foreman.

June 29th, 1917. 1034

UNITED STATES of AMERICA, :

to-wit:

District of Maryland, :

I, ARTHUR L. SPAMER, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the indictment, together with the 1035
endorsement thereon, which was filed on the 29th day of June, 1917, in the therein entitled case of United States of America vs. Romanus E. Baker and Jacob M. Wilhide, No. 630 Criminal Docket, in said District Court.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court, this 13th day of September, 1917. 1036

ARTHUR L. SPAMER,
Clerk.

1037

DEFENDANTS' EXHIBIT 1.

PROTECT YOUR RIGHTS

By Ralph Korngold

War has been declared. Conscription has passed. Under cover of the war excitement attempts
1038 are being made to pass some of the most reactionary and oppressive legislation. Rights that the working people have struggled for centuries to obtain may be wiped out within a few short months.

Only one organization stands uncompromisingly and fearlessly between the people and those who would deprive them of their liberties. This
1039 organization has opposed war and conscription. It is still opposed to war and conscription. It is now fighting to compel those who were responsible for the war, and who will profit by it, to pay the cost of the war. It is struggling to preserve whatever rights remain to the American people. Do you want to help in this struggle?

Then join the Socialist party.

1040 But, you say, why should I belong to the party? Is it not sufficient when I vote the Socialist ticket? It is not sufficient. We want you to belong to the party because we want the party to belong to you. When you are a Republican or a Democrat you do not run your party. It is true you select the candidates at the primaries, but who puts up the candidates at the primaries, and who pays their campaign expenses? If you want to know,

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ask yourself whom these candidates represent after they are elected. Do they represent you or the corporations?

We do not want you merely to vote for the party, we want you to BE the party. We want you to help put up the candidates, frame the platform, help pay the expenses of the party and help spread the propaganda of Socialism. In other words, our aim is not to do something for you but to wake you up to the necessity of doing something for yourself.

1042

Of course it is going to cost you some time and some money to belong to the Socialist Party. Not a great deal, but some. It is costing the big capitalists considerable time and a great deal of money to belong to the old parties but they find the investment well worth while. Apparently it does not cost the workman anything at all to belong to the old parties, but as a matter of fact it cost them a great deal. Every law on the statute books that favors the corporations and hurts the people is part of the cost he pays. Every strike that is broken up by means of the injunction, the police or the militia is part of the cost he pays. The high cost of living is part of the cost he pays. The present war in which the American people were plunged against their will is part of the costs he pays. His very life, or the life of some dear one may be part of the costs he will have to pay. O, yes, it costs a working man a great deal in time, money and happiness to belong to the old parties!

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There is another reason why we want you to join the Socialist party. We want Socialism just as quickly as we can possibly get it, and so do you. This does not mean that we expect the full program of socialism to be realized in a few short years, but we know the more people working for Socialism the quicker Socialism will come. I have
1046 heard men say: Yes, I would join the Socialist Party, if the party made more headway. But how can you expect the party to make more headway unless you and others who vote the Socialist ticket come in and help? Would you be satisfied to have Socialism come as a result of the efforts and sacrifices of others? Would you be satisfied to enjoy, or have your children enjoy, the benefits of Social-
1047 ism while knowing that you have allowed others to do all the paying and sweating and fighting?

The party needs you now as it never needed you before. You need the party now as you never needed it before. Men are going to give up their lives for a cause which you are convinced is neither great or noble, will you then begrudge your best efforts to the cause that you feel certain is both
1048 great and noble and in which lives the only hope and promise of the future? If men will do so much for an error, what should you not be willing to do for the truth?

Join the Socialist Party Now

If you do not know where the Socialist Local in your community meets, or if there is no Socialist local in your community, write to the National

1049 Office, Socialist Party, 803 W. Madison Street, Chicago, Ill.

DEFENDANT'S EXHIBIT 2.

Extracts from the minutes of the Albany Socialist Party Local of July 11th, 1917, as follows:
1050 "Motion passed not to distribute 'The Price We Pay' until we know if it is legal."

DEFENDANTS' EXHIBIT 3.

Extracts from the minutes of the Albany Socialist Party Local of July 25th, 1917, as follows:
1051 "Motion passed to rescind action of local of two weeks ago in passing a motion against distributing 'The Price We Pay,'' and call for distributors."

DEFENDANTS' EXHIBIT 5.

Extract from American Socialist published at Chicago, Ill., issue of Saturday, August 4th, 1917. 1052

FAMOUS DECISION BY JUDGE ROSE.

Judge Rose held that Baker and Wilhilde had not violated the Espionage Law in distributing the leaflet. His remarks in ordering the jury to return a verdict of not guilty, submitted by Bur-

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leson in an implied justification of his conduct in suppressing the Socialist papers, were as follows:

The Court. I might as well make perfectly clear what I understand to be the issue in the case.

Every man has a perfect right to any opinion he may see fit to form about any proposed law or about any law that is on the statute
1054 books. Any man may do any thing, in itself legal, to secure the repeal of any law in force. To that end he may make any argument that commends itself to his reason and judgment against the policy of any particular law, whether it be the law for a selective draft or any other. And he is not answerable for the wisdom of his arguments. He could not very
1055 well be put on trial even for the good faith of some of them. I am afraid, if he could be, most of the political orators in every campaign would be liable for much they say about the other party. We all of us say more against our political opponents then we really believe. But there is one limit: As long as the law is the law, it is the duty of every man to
1056 obey it, and he may not, under color or pretense of arguing against the wisdom of the law, or of advocating its repeal, do anything with intent to procure its violation. Now, I have not seen the circulars that were distributed by the defendants; they may be wise or unwise, temperate or intemperate. I do not know a thing about them.

1057

But the one thing the jury is to inquire into is not as to the wisdom or the lack of wisdom of any statements in those circulars, or their truthfulnesss or their fairness. That is not the question. The one sole question in the case is whether these men, in any thing they did, intended to persuade them not to obey the order to come to the colors. That is the one 1058
question. So the real inquiry here is, Can the government show, always beyond a reasonable doubt, that these men were trying to persuade people to disobey the law? Whether they approached candidates for enlistment or persons within the age for enlistment and made any statements to such persons which might naturally make such persons reluctant 1059
to obey the law, is one of the facts to be taken into consideration by the jury; but the jury cannot convict unless they are satisfied, of course, beyond a reasonable doubt, that these men were engaged in doing something which they proposed and intended should prevent men within the military age from obeying the law. If the jury is satisfied beyond a reason- 1060
able doubt, then the case is made out. If they have any doubt about the purpose of these men, they must acquit them, however mistaken the jury may happen to think they were about the policy of the law, however unfair or extravagant the jury may think their arguments against it were.

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I do not think there is anything to go to the jury in this case.

You may have your own opinions about that circular; I have very strong individual opinions about it, and as to the wisdom and fairness of what is said there, but so far as I can see it is principally a circular intended to
1062 induce people to subscribe to Socialist newspapers and to get recruits for the Socialist Party. I do not think that we ought to attempt to prosecute people for that kind of thing. It may be very unwise in its effect, and it may be unpatriotic at that particular time and place, but it would be going very far indeed, further, I think than any law that
1063 I know of would justify, to hold that there has been made out any case here even tending to show that there was an attempt to persuade men not to obey the law.

There is a very lurid description of the horrors of war in that circular, some of it well written, some of it not so well written. But after all, there is no difference of opinion that
1064 war is a terrible catastrophe, and it involves many terrible things. The circular develops some sort of a theory, not very clearly argued out that if everbody had voted the Socialist ticket there would have been no war. The circular ends up with an appeal to subscribe to the Socialist paper for 50 cents a year, or 25 cents for every six months.

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Mr. Latane. The side of it that appealed to the government was this, your honor. Of course we are perfectly satisfied with your honor's determination of the matter, but just an explanation, it starts out with the words, "Conscription is upon us and the draft law is a fact."

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The Court. That I understand to be a fair and reasonable deduction that from the point of view it all could be avoided if the people earlier had taken this Socialist paper and had voted the Socialist ticket.

Mr. Latane. The point that occurred to the government is this: These people are too clever to directly, in print, attack the draft law, 1067
so under guise of advocating the principles of the Socialist Party, they give the whole draft proposition a very raw deal.

The Court. That is possible, but you must prove the intent beyond the possibility of a reasonable doubt.

Mr. Latane. All we want is to get some ju- 1068
dicial determination of the matter.

The Court. The judicial determination of the matter is that in whatever form they put what they say or do, whether that of advocating the principles of any political party—Republican, Democratic, Prohibitionist, Socialist—or under any other guise whatsoever, it

1069 is an offense to do anything with the intent of bringing about a violation to the law, but the commission of that offense must be proved, the intent must be established by evidence which will justify a jury in holding that it was made out beyond a reasonable doubt, and in this case there is no such evidence.

1070 Gentlemen of the jury, you have the instructions of the court to return a verdict of not guilty.

DEFENDANTS' EXHIBIT 6.

1071 Copy of Item appearing in the New York Call, of July 12th, 1917.

"PRICE WE PAY" NOT TREASON, JUDGE HOLDS."

"This circular, "The Price We Pay," contains nothing whatever to warrant a criminal charge to

1072 **be lodged against any man for distributing it. Every man has a right, if he chooses, to criticise adversely any system of society or any law, so long as he obeys the law while it remains a law."**

This statement was made yesterday afternoon by Judge Rose, sitting in the United States District Court in Baltimore, in directing a jury to acquit Romanus E. Baker and Jacob Wilhide charged with conspiracy for distributing the

pamphlet and for conducting an anti-war meeting at Hagerstown, Md. 1075

The direction for acquittal was made on the motion of Frederick Haller, counsel for the defense, after the prosecution had rested its case.

At almost the same time the two men were being acquitted in Baltimore 13 young persons, held on a charge of "treason" in Philadelphia, were released there by a magistrate, after the district attorney's office had informed him that the charge against the Socialists was absurd. The 13 had been arrested for distributing a pamphlet entitled, "Long Live the Constitution of the United States." 1074

This latter pamphlet and "The Price We Pay" have been the means of getting people arrested all over the country on charges carrying from "disorderly conduct" to "treason." No convictions have been secured against those held for distributing "The Price We Pay." 1075

In Philadelphia the charge against the 13 persons arrested there was considered so serious that bail aggregating $110,000 was demanded from them. They have been in jail since their arrest on July 7. 1076

Seven of the thirteen were boys and six were girls. One of those accused of being "traitors" is seventeen years old. Most of the others are just passed the legal age.

A special edition of the People's Press, the local Socialist paper, which has been denied the use of

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the United States mails, will be issued on Friday. It will cover the arrest of the thirteen, nine of whom were held at the time of their arrest in a $10,000 bail individually, and four in $5,000 and who were released without even being put on trial.

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STIPULATION SETTLING BILL OF EXCEPTIONS.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

1082

CLINTON H. PIERCE, ANGELO CREO and CHARLES Z. ZEILMAN, CHARLES NELSON.

Plaintiffs-in Error,

against

UNITED STATES OF AMERICA,

Defendant-in-Error.

1083

It is hereby stipulated and agreed that the foregoing is a true Bill of Exceptions of the said District Court in the above entitled matter, containing all the evidence, as agreed upon by the parties.

Dated Auburn, N. Y., February 28th 1918.

D .B. LUCEY,

Attorney for Plaintiff and Defendant-in-Error. 1084

FREDERICK A. MOHR,

Attorney for Defendants and Plaintiffs-in-Error.

1085

ORDER SETTLING BILL OF EXCEPTIONS.

At a Stated Term of the United States District Court for the Northern District of New York held at the Postoffice Building in the City of on the

Present, Hon. George W. Ray, Judge of the
1086 United States District Court.

CLINTON H. PIERCE, ANGLEO CREO, CHARLES Z. ZEILMAN, CHARLES NELSON,

Plaintiffs-in Error,

against

1087 UNITED STATES OF AMERICA,

Defendant-in-Error.

This action having been tried before a stated term of this Court, and a Jury having rendered a verdict in favor of the plaintiff and against the defendants, and the foregoing bill of exceptions having been duly prepared containing all the evidence, it is now,

1088 Duly settled, signed and made a part of the record and ordered on file herein this day of , 1918.

GEORGE W. RAY,
United States District Judge.

Notice of settlement waived

D. B. LUCEY,
United States Attorney.

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JUDGMENT OF CONVICTION.

And thereupon, and on the 30th day of October, in the year of our Lord one thousand nine hundred and seventeen, of the same term of October, at the Ctiy of Auburn, came the Marshal of the United States for the Northern District of New York, and brought into the said District Court, the said de- 1090
fendants, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, and Charles Nelson; and the said defendants, being duly arraigned upon the said Indictment, in open Court, and called upon to plead thereto, each pleaded that he was not guilty of the offenses charged therein, in manner and form as the same are therein set forth, and of this they put themselves upon the country and said United States of America did the like. 1091

Wherefore, let a jury be summoned, empanelled and sworn to try the said issue at the October Term of said Court, in the year of our Lord one thousand nine hundred and seventeen, at the City of Auburn, in the said District;

And now, on this 17th day of November of the term of October, one thousand nine hundred and seventeen, aforesaid, come as well the Attorney 1092
for the United States for the said District, as the said defendants, and come also the jurors aforesaid, to wit:

Dwight Bowen, Judson Green, Daniel Doyle, Marion V. Strong, Fred C. Kosters, John Harrison, Charles Wood, Edward Haley, Frank E. Goodwin, William A. Martin, Howard Crofoot,

1093 Irving J. King, and the said Jurors to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths say: That each of the said defendants, Clinton H. Pierce, Angelo Creo, Charles Z. Zeilmon are guilty as charged in the 1st, 2nd, 3rd and 6th counts of the said Indictment; and that the said defendant,
1094 Charles Nelson, is guilty of the offenses charged in the 3rd count of the said Indictment, in manner and form as the same are therein set forth; and they further say that the said defendant, Charles Nelson, is not guilty of the offenses charged in the 1st, 2nd and 6th counts of the said indictment.

And thereupon, the said defendants, Clinton H.
1095 Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson, being present in open Court, and having heard the said verdict, are inquired of by the Court if they have anything to say why the Judgment of the law should not be pronounced upon them, according to the said verdict; and no sufficient answers being given, His Honor, the Judge of the said Court, in the presence of the said
1096 defendants, does here adjudge and sentence as follows:

That the said defendant, Clinton H. Pierce, for the said offenses of which he stands convicted as aforesaid, be imprisoned in the Albany County Jail for the term of ten months upon each of the First, Second, Third and Sixth counts of the said Indictment, and pay a fine of Two Hundred and

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Fifty Dollars upon each of the Third and Sixth counts of the said Indictment;

That the said defendant, Angelo Creo, for the said offenses of which he stands convicted as aforesaid, be imprisoned in the Albany County Jail for the term of one year upon each of the First, Second, Third and Sixth Counts of the said Indictment, and pay a fine of Three Hundred Dollars upon each of the Third and Sixth counts of the said Indictment;

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That the said defendant, Charles Z. Zeilman, for the said offenses of which he stands convicted as aforesaid, be imprisoned in the Albany County Jail for the term of eight months upon each of the First, Second, Third and Sixth counts of the said Indictment, and pay a fine of Two Hundred and Fifty Dollars upon each of the Third and Sixth counts of the said Indictment;

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That the said defendant, Charles Nelson, for the said offenses of which he stands convicted as aforesaid, be imprisoned in the Albany County Jail for the term of four months, and pay a fine of Fifty Dollars.

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W. S. DOOLITTLE.
Clerk.

Filed November 17, 1917.

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ASSIGNMENTS OF ERROR.

UNITED STATES DISTRICT COURT,—Northern District of New York.

1102 CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN and CHARLES NELSON.

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

1103 The defendants Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson, having heretofore sued out a Writ of Error from this Court to the Supreme Court of the United States, file the following Assignments of Error, upon which they will rely.

(A) As to the Indictment:

1104 1. That the Court erred in overruling the demurrer to the indictment taken upon the grounds set forth in said demurrer, which is herewith referred to, and made a part hereof.

2. That said indictment does not state an offense under Sections 4067, 4068, 4069 and 4700 of the Revised Statutes of the United States, or as a result of the Proclamation and Regulations of the

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President of the United States, dated April 6, 1917.

3. That said indictment does not state an offense under the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States."

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4. That said indictment does not state an offense under the Act of Congress approved June 15, 1917, entitled "An Act to Punish Acts of Interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage and to better enforce the criminal laws of the United States and for other purposes."

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5. That said indictment does not state an offense under Sections 4, 19, 21, 37, 42, 135, 136, 140, and 141 of the Act of Congress approved March 4, 1909, as set forth in said indictment, nor does it state any offense against any law of the United States, by the defendants herein, or by any one of them.

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6. That the Court erred in denying the motion of defendants for a Bill of Particulars, on the ground that the indictment failed to state with sufficient particularity the time, place and circumstances of the acts with which they were charged as constituting the crimes set forth in the indictment.

7. That the Court erred in denying the motion and demand of defendants that the Government

1109 furnish them with the names and addresses of all the witnesses sworn by the Government before the Grand Jury.

(B) Opening of the Trial.

8. That the Court erred in denying motion of defendants made at the opening of trial, that the
1110 defendants be permitted to go to trial together only on the conspiracy counts One and Two, and that on Counts Three, Four, Five and Six, that each of them have separate trials.

9. That the Court erred in denying the motion of defendants made at the opening of the trial, that the Government elect whether it proceed to trial in the first two, or the last four Counts of the in-
1111 dictment.

10. That the Court erred in denying the motion of the defendants made at the opening of the trial, that on the first Count of the indictment the Government elect upon which of the enumerated paragraphs set forth in Count One of the indictment it places the defendants on trial.

1112 (C) As to the Trial:

11. That the Court erred in denying the motion of defendants made at the conclusion of the case for the Government to dismiss the indictment herein and to discharge the defendants, upon the ground that the Government had failed to sustain by the evidence offered the commission of any crime or crimes charged in the indictment, or any

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offense whatever against the United States of America.

Also, it is now urged upon the further ground that the Act of Congress approved June 15, 1917, and known as the Espionage Law, is unconstitutional and void, in that it violates Amendment 1 of the Constitution of the United States in that it abridges freedom of speech and freedom of the press.

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12. That the Court erred in admitting the testimony of John J. Skelly over the objection of defendants, on the ground that the acts sought to be proved by him as constituting a crime were not set forth in the indictment, and occurred previous to the times set forth in the said indictment.

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13. That the Court committed divers errors in the admission of testimony on behalf of plaintiff and refusing to admit testimony offered in behalf of the defendants herein, as shall appear by the exceptions taken by defendants during the course of the trial, as will appear in the Case and Exceptions to be filed.

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14. That the Court erred in denying the motion of defendants herein, to direct a verdict of acquittal for the defendants, upon the ground that the proof failed to show the commission of any of the offenses set forth in the indictment.

(D) Judge's Charge.

15. That the Court erred in charging the Jury as follows:

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"The United States says that the defendants are presumed to know of the declaration of war in this part of the United States, and knew its purpose, and that they knew the statement as to the J. P. Morgan loans to be a false statement as to the purpose and intent in entering the war. All of that, Gentlemen, is for your determination."

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16. That the Court erred in refusing to charge the jury as requested by the defendant, as follows:

"That there is no evidence in this case, from beginning to end, that proves or tends to prove, the falsity of the statement concerning J. P. Morgan in that circular."

17. That the Court erred in charging the Jury

1119 as follows:

"Now, Mr. Lucey claims that he has proven it, to be false, and he claims that he has proven it, on behalf of the Government, to be false in this way.

The statement is that:

"Our Entry into"--meaning the entry of the

1120 United States into the war--"was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

"Now, that attributes a venal and bad motive indirectly to Congress and the President in advo-

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cating the war and approving the Declaration of War. In other words, it says here that our entry was determined by that motive and that purpose. Now, Mr. Lucey says he has proven the falsity of that by putting in evidence the Message to Congress, read to Congress by the President at the time mentioned by Mr. Magee, in which the President stated the reasons why we should enter 1122
the war—the reasons why Congress should declare war—the reasons why Congress should declare war. Mr. Lucey claims that those are the true and correct reasons and motives, and all of the motives and reasons that led Congress—the Senate and the House in joint session—to adopt that resolution—the President to recommend and approve it." 1123

"Now, it is for you to say, Gentlemen. Is that a false statement? Has Mr. Lucey proved to your satisfaction beyond a reasonable doubt, that that statement is false?"

18. That the Court erred in refusing the request of the defendant to charge the jury as follows:

"That the statement in the pamphlet just referred to as to Morgan & Co.'s loans to the allies, 1124
which might have been repudiated, was an opinion which the defendant had a right to hold, and to circulate, regardless of its truth or falsity, of its correctness or incorrectness, regardless of the reasons stated either in the President's Message or in the Declaration of War by Congress."

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19. That the Court erred in refusing to charge the jury as requested by the defendants, that the statements in the circulars, as to Morgan's loans.

"Was simply a conclusion based upon all the data at hand by the defendants or by the writer of this pamphlet, a statement of a conclusion, and that they have a right to hold it, and to circulate
1126 the pamphlet, regardless of its correctness or incorrectness."

20. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

"That so far as that statement is concerned and all other statements in the pamphlet, that they were justified in accepting the state-
1127 ments, and conclusions, and opinions of the writer without regard to their truth or falsity without regard to their correctness or incorrectness, and if they circulated and accepted those opinions passing themselves upon the authenticity and reliability of the source, that they were without fault."

21. That the Court erred in charging the jury as
1128 follows:

"Unless they knew, or were informed that the statements contained therein were true, it was their duty, in view of the common knowledge, to make some investigation before putting it out. When they put it out, they adopted it. It may have been their duty to have someone make some investigation, and to get some

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information as to whether it was true or false, in view of all the information they had and the conditions surrounding them. It is for the jury to say—to find whether or not they were justified in putting it out without any inquiry, or any actual knowledge on the subject. I have already charged the jury that—they must know it to be false from their general knowledge, or otherwise, and I repeat that charge."

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22. That the Court erred in refusing to charge the jury in substance, that the fact that there is no evidence in the case that any person had received a pamphlet who had been accepted under the Selective Draft Act or in the Regular Army, had nothing to do with the question as to whether or not defendants had offended against the Espionage Law.

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23. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

"My client requests that Your Honor charge the jury that if the defendants, on or about the 12th day of July, 1917, read a newspaper item in a newspaper called "The New York Call," to the effect that it had been decided by a Federal Court Judge at Baltimore, in a case before him, that the distribution of the paper called "The Price We Pay" was legal, then they were justified in circulating that paper."

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24. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

> "The Government must establish beyond a reasonable doubt that the defendants believed these statements to be false, and that their distribution of them was wilfull."

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25. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

> "That the Constitution guarantees the right of freedom of speech and the press, and under this constitutional guarantee the defendants had the right to distribute "The

1135 Price We Pay."

26. That the Court erred in refusing to charge the jury:

> "That the Constitution of the United States conferred no power upon Congress to pass the Selective Draft Act, approved May 18, 1917."

27. That the Court erred in refusing to charge

1136 the jury:

> "That the Constitution conferred no power upon Congress to pass the Espionage Act, approved June 15, 1917."

28. That the Court erred in charging that the Constitution conferred upon Congress power to enact said Espionage Law.

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(E) In General:

29. That the Court erred in refusing to grant the motion made by the defendant after the verdict, to set aside the verdiuct and grant a new trial, on the ground that there was no evidence to sustain the verdict as a matter of law, and that the verdict was against the evidence.

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30. That the evidence failed to establish an offense under the Espionage Law approved June 15, 1917, or any offense against any law of the United States, by the defendants, or any of them.

31. That the Act of Congress known as the Espionage Law approved June 15, 1917, was in violation of the Constitutional prohibtion under the First Amendment, in that it abridges the freedom of speech and of the press.

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31. That the acts of the defendants as established by the evidence were but the lawful exercise of their constitutional right of free speech and free press.

WHEREFORE, the said defendants pray that the judgment of the said Court be reversed.

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And the said defendants also beg leave to submit further additional and amended Assignments of Error, within thirty days of the date hereof.

Dated at Auburn, N. Y., December 14, 1917.

FREDERICK A. MOHR,
LEWIS T. HUNT,
Attorneys for the Plaintiffs in Error.

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PETITION FOR WRIT OF ERROR.

UNITED STATES DISTRICT COURT—For the Northern District of New York.

THE UNITED STATES OF AMERICA,

Plaintiff,

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against

CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN and CHARLES NELSON.

Defendants.

Now come the above named defendants, Clinton
1143 H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson, by their Attorney, Frederick A. Mohr, and complain that on the 17th day of November, 1917, the District Court of the United States for the Northern District of New York gave judgment in the above entitled cause against the defendants, in which judgment in this cause certain errors were committed to the prejudice of
1144 these defendants.

FIRST: In respect to the Court's construction and application of the Constitution of the United States, as will appear from the Assignment of Errors filed herewith.

SECOND: As to the Court's rulings as to the constitutionality of certain laws passed by the Congress of the United States, and approved by

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the President thereof, as will appear more fully from the Assignment of Errors filed herewith.

THIRD: As to the Court's disposition of the merits of the cause, and of all rulings of said Court during the trial, which will appear from the Assignment of Errors filed herewith.

WHEREFORE, the said defendants, Charles H. Pierce, Angelo Creo, Charles Z. Zeilman and Charles Nelson, pray for the allowance of the Writ of Error, and for such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable, the Justices of the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein to correct that error, that what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of the said Writ of Error by said Supreme Court of the United States,

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And your petitioners will ever pray, etc.

Dated, the 12th day of December, 1917.

FREDERICK A. MOHR,

Frederick A. Mohr and Lewis T. Hunt,
Attorneys for defendant,
53 Genesee St., Auburn, N. Y.
Office Address of Lewis T. Hunt,
86 State St., Albany, N. Y.

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Writ allowed, Dec. 14, 1917.

George W. Ray, U. S. Dist. Judge.

Writ of Error to operate as a supersedeas allowed returnable according to law, the defendants each to furnish bond in the sum of $1,500, conditioned according to law, and subject to the ap-

1150 proval of the United States District Judge for the Northern District of New York.

GEORGE W. RAY,
U. S. District Judge.

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CITATION.

BY THE HONORABLE GEORGE W. RAY,
One of the Judges of the District Court of the United States.
To the United States of America, defendant-in-error.

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GREETING:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the Supreme Court, at the City of Washington in the District of Columbia on the 12th day of January, 1918, pursuant to a Writ of Error filed in the office of the Clerk of the 1155
United States District Court for the Northern District of New York, wherein Clinton H. Pierce, Angelo Creo, Charles Z. Zeilmon and Charles Nelson are plaintiffs-in-error and you are defendant-in-error, to show cause if any there be why the order and judgment in said writ mentioned should not be corrected and speedy justice done in that behalf.

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Given under my hand at the City of Utica, State of New York in the District above mentioned this fourteenth day of December, 1917 and of the independence of the United State the One Hundred and Forty-second.

GEORGE W. RAY,
Judge of the U. S. District Court.

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STIPULATION.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF NEW YORK.

CLINTON H. PIERCE, ANGELO
CREO, CHARLES Z. ZEILMAN,
1158 CHARLES NELSON,
Plaintiffs-in-Error.

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

1159 It is hereby stipulated and agreed that the record in the above-entitled case shall consist of the following papers now on file with the Clerk of the United States District Court for the Northern District of New York:

Writ of Error and Order allowing same dated December 14th, 1917.

Indictment filed October 25, 1917.

Demurrer to Indictment.

1160 Opinion of Judge Ray denying Demurrer.

Demand for Bill of Particulars and List of Witnesses.

Opinion of Judge Ray denying demand for Bill of Particulars and List of Witnesses.

Bill of Exceptions dated

Stipulation settling Bill of Exception.

Order Settling Bill of Exceptions.

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Judgment of Conviction.

Assignments of Error, dated December 14, 1917.

Petition for Writ of Error and supersedeas entered therein dated December 14, 1917.

Citation dated December 14, 1917.

Stipulation Settling Record.

Clerk's Certificate.

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D. B. LUCEY,
Attorney for Plaintiff and Defendant-in-Error.

FREDERICK A. MOHR,
Attorney for Defendants and Plaintiffs-in-Error.

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CONSENT.

CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN, CHARLES NELSON,
Plaintiffs-in-Error,

1166 against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as
1167 agreed on by the parties.

Dated June 10, 1918.

FREDERICK A. MOHR,
Attorney for Defendants and Plaintiffs-in-Error.

D. B. LUCEY,
Attorney for Plaintiff and Defendants-in-Error.

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CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK.

CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN, CHARLES NELSON, 1170

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

I, William S. Doolittle, Clerk of the District 1171
Court of the United States of America for the Northern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have cause the seal of the said Court to be hereunto affixed at the City of Utica, in the Northern District of New York, 1172
this day of in the year of our Lord, one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-second.

WILLIAM S. DOOLITTLE,
Clerk.

IN THE

Supreme Court of the United States

No. ——

CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN
CHARLES NELSON, *Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA, *Defendant in Error.*

PETITION TO SET ASIDE ORDER DOCKETING AND DISMISSING CASE.

Plaintiffs in error, by their attorney, Frederick A. Mohr, respectfully show the Court:

1. That the plaintiffs herein, were indicted by a Grand Jury, held at a stated term of the United States District Court for the Northern District of New York, begun and held in the Court House in the City of Auburn, on the 2d day of October, 1917, for alleged violations of the Espionage Act as approved by the President, June 15, 1917.

2. That plaintiffs in error were tried by a jury, convicted and sentenced on the 17th day of November, 1917, Hon.

George W. Ray, United States District Judge, for the Northern District of New York, presiding.

3. That the plaintiffs in error thereupon, on the 14th day of December, 1918, sued out a writ of error from the United States Supreme Court, to said District Court, appealing from the aforesaid judgment of conviction on the ground of unconstitutionality of said law, and the part thereof under which the then defendants were convicted and upon the construction and application of said law as involved in the case at bar, as well as upon other issues of merit and upon demurrer to the indictment.

4. That said writ of error was allowed, and the citation made returnable January 12, 1918. That owing to the fact that the stenographer at the trial had accepted a position in Washington in war work, and to the difficulties under which she labored, it was impossible to obtain a transcript of the minutes of the trial until about February 2, 1917. Upon their receipt the testimony was with all possible speed put into narrative form, submitted to District Attorney Lucey and his amendments thereto were received and accepted on February 28, 1918, but at that time and for some time after that, Mr. Lucey remained in possession of some of the exhibits.

5. It was agreed between defendant and the District Attorney through conversation and correspondence, that the case should be printed and the printed copies used as the original record, and that all proofs be submitted to Mr. Lucey before printing.

6. All extensions of time had been provided for by written consent of the District Attorney until March 20th, and before that date, Mr. Lucey had telegraphed me that all necessary extensions would be allowed. Orders had been entered upon these consents, except that Mr. Lucey omitted to mail me subsequent to his telegram a written consent.

This, however, he corrected May 15, 1918. (See Exhibits 1, 2, 3, 6.)

7. The printing of the record began about March 20, and deponent proceeded to complete the same, so far as possible, and on May 15th obtained from Mr. Lucey a consent to an order extending the time until June 15th, after an interview in which we agreed upon the record, and arranged all necessary matters for the perfecting of the appeal, and on May 16th I obtained an order from Judge Ray allowing the necessary extension and the same was duly filed. (See Exhibits 4 and 5.)

8. On June 12th I submitted the printed record complete to Mr. Lucey, who signed all necessary stipulations, and on the following day obtained the necessary order from Judge Ray and filed the record. I left a duplicate copy and the filing fee with Judge Ray who undertook to see that it was properly certified and immediately forwarded to the clerk of the Supreme Court. It was received by the clerk June 19th.

9. I then corresponded with the Clerk of the Supreme Court as to fees and other matters of practice and on July 11th learned for the first time that the case had been docketed and dismissed May 6, 1918.

10. No notice had been given to me in any way that such motion had been made. If I had been so informed in any way a second appeal could have been taken, if no other course was advisable.

11. The expense of this writ has to date approximated one thousand dollars.

12. Counsel understands that the Attorney General's office does not object to an order vacating the dismissal of the writ of error and granting leave to file the record and docket the cause. The printed transcript of the duly certified Record is submitted with this petition and thirty printed copies are ready to be forwarded to the Clerk of this Court.

Wherefore petitioners pray that an order be made setting aside the order made May 6, 1918, docketing and dismissing this cause and that leave be granted to file the record and docket the case.

FREDERICK A. MOHR,
Attorney for Plaintiffs in Error,
600-601 Masonic Building,
Auburn, New York.

City of Washington, District of Columbia, ss:

Frederick A. Mohr, being duly sworn says that he is the attorney for the plaintiffs in error, that he has read the foregoing petition, and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein alleged to be upon information and belief and as to those matters he believes it to be true.

That the reason the attorney makes this affidavit is because plaintiffs in error are not in the city of Washington, but reside in Albany, New York.

That the grounds of deponent's knowledge and belief consist of the fact that he is acquainted with the facts and participated in all of the above proceedings as the attorney for plaintiffs in error.

FREDERICK A. MOHR.

Subscribed and sworn to before me this 8th day of October, A. D. 1918.

Wm. L. Stansbury
Notary Public, D. C.

EXHIBIT ONE.

At a Term of the United States District Court for the Northern District of New York, held at the Judge's Chambers at Norwich, N. Y.

Present: Hon. George W. Ray, District Judge.

United States of America, Defendant-in-Error,

vs.

Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs-in-Error.

Upon the annexed consent of Dennis B. Lucey, United States Attorney, and upon motion of Frederick A. Mohr, Attorney for the plaintiffs-in-error, it is hereby

ORDERED that the time of the said plaintiffs-in-error for the return of the citation, and for filing transcript of record in this case in the Supreme Court of the United States is hereby extended until February 12, 1918, and it is further

ORDERED that the time in which plaintiffs-in-error may file additional and supplemental assignments of error is extended until the same date.

Dated January 10, 1918.

GEO. W. RAY.
U. S. District Judge.

I hereby consent to the entry of above order.
Dated January 8, 1918.

D. B. LUCEY,
U. S. District Atty.

Certificate of W. S. Doolittle, Clerk of the District Court for the Northern District of New York, annexed, dated Sept. 13, 1918, with seal.

EXHIBIT TWO.

At a Term of the United States District Court for the Northern District of New York, held at the Judge's Chambers at Norwich, N. Y.

Present: Hon. George W. Ray, District Judge.

United States of America, Defendant-in-Error,
vs.
Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs-in-Error.

Upon the annexed consent of Dennis B. Lucey, United States Attorney, and upon motion of Frederick A. Mohr, Attorney for the plaintiffs-in-error, it is hereby

ORDERED that the time of the said plaintiffs-in-error for the return of the citation, and for filing transcript of record in this case in the Supreme Court of the United States is hereby extended until February 28, 1918, and it is further

ORDERED that the time in which plaintiffs-in-error may file additional and supplemental assignments of error is extended until the same date.

Dated February 2, 1918.

GEO. W. RAY.
U. S. District Judge.

I hereby consent to the entry of above order.
Dated February 2, 1918.

D. B. LUCEY,
U. S. District Atty.

Certificate of W. S. Doolittle, Clerk of District Court, annexed, dated Sept. 13, 1918, with seal.

EXHIBIT THREE.

At a Term of the United States District Court for the Northern District of New York, held at the U. S. Court Room, Albany, N. Y.

Present: Hon. George W. Ray, District Judge.

United States of America, Defendant-in-Error,
vs.
Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs-in-Error.

Upon the annexed consent of Dennis B. Lucey, United States Attorney, and upon motion of Frederick A. Mohr, Attorney for the plaintiffs-in-error, it is hereby

ORDERED that the time of the said plaintiffs-in-error for the return of the citation, and for filing transcript of record in this case in the Supreme Court of the United States is hereby extended until March 20, 1918, and it is further

Dated February 25, 1918.

GEO. W. RAY.
U. S. District Judge.

I hereby consent to the entry of above order.
Dated February 25, 1918.

D. B. LUCEY,
U. S. District Atty.

United States of America, District Court Clerk's Office, Northern District of New York.

I, William S. Doolittle, Clerk of the District Court of the United States, for the Northern District of New York, do hereby certify that I have compared the annexed copy of Stipulation and Order, in re United States vs. Clinton H. Pierce, *et al.*, Crim. No. 1350, with the original now on file in this office, that the same is a correct transcript therefrom and of the whole of said original.

In Testimony Whereof, I have caused the seal of the

said Court to be affixed at the City of Utica, in said District, this 13th day of September, A. D. 1918.

W. S. DOOLITTLE,
Clerk.

(Seal.)

EXHIBIT FOUR.

At a Term of the United States District Court for the Northern District of New York, held at the Judge's Chambers at Norwich, N. Y., on the 20th day of March, 1918.

Hon. George W. Ray, United States District Judge Presiding.

United States District Court, for the Northern District of New York.

Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs in error,

vs.

United States of America, Defendant in error.

Upon the annexed consent of Dennis B. Lucey, United States District Attorney, dated May 15, 1918,

And upon motion of Frederick A. Mohr, Attorney for the plaintiffs in error, herein, it is hereby

ORDERED that the time in which the return of the citation and writ of error, allowed in above entitled matter, Dec. 14, 1917, and for filing the transcript of record in this case in the Supreme Court of the United States be extended until June 15, 1918.

Enter nunc pro tunc.

GEO. W. RAY,
U. S. District Judge.

United States District Court, for the Northern District of New York.

Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs in error,

vs.

United States of America, Defendant in error.

Consent is hereby given that an order may be entered in the above entitled matter extending the time in which return of the citation and filing the transcript of record in this case in the Supreme Court of the United States be extended until June 15, 1918, either with or without the entry of a nunc pro tunc order and without further notice to defendant in error.

Dated May 15, 1918.

.....

Attorney for Plaintiffs in error.

D. B. LUCEY,

(Seal.) *Attorney for defendant in error.*

EXHIBIT FIVE.

At a Term of the United States District Court for the Northern District of New York, held in the Court House in the City of Syracuse, N. Y., on the 16th day of May, 1918.

Hon. George W. Ray, United States District Judge Presiding.

United States District Court, for the Northern District of New York.

Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs in error,

vs.

United States of America, Defendant in error.

Upon reading and filing the stipulation between the attorneys for the parties hereto, dated May 15, 1918, with the papers thereto annexed,

And upon motion of Frederick A. Mohr, attorney for the plaintiffs in error, it is hereby

ORDERED, that the assignments of error, herewith presented be filed and received as the assignments of error in this case.

GEO. W. RAY,
U. S. Judge.

United States District Court, for the Northern District of New York.

Clinton H. Pierce, Angelo Creo, Charles Z. Zeilman, Charles Nelson, Plaintiffs in error,

vs.

United States of America, Defendant in error.

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the within constitutes the assignments of error taken and to be relied upon by plaintiffs in error herein,

And Attorney for defendant in error hereby consents that application may be made by plaintiffs to file the same without further notice to defendant in error.

Dated May 15, 1918.

FREDERICK A. MOHR,
Attorney for Plaintiffs in error.
D. B. LUCEY,
Attorney for defendant in error.

(Seal.)

EXHIBIT SIX.

POSTAL TELEGRAPH—COMMERCIAL CABLES.

TELEGRAM.

Bu 5 n 30 Govt 945am.
Ogdensburg N. Y. Mar. 15, 1918
Frederick A. Mohr,
Auburn, N. Y.

Will consent to Necessary extension I must see all papers before going to Washn expect to be at home Tuesday.

D. B. Lucey,
US Atty.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CLINTON H. PIERCE, ANGELO CREO, Charles Z. Zeilman, Charles Nelson, Plaintiffs in error,
v.
THE UNITED STATES OF AMERICA.
No. ——.

MEMORANDUM FOR THE UNITED STATES.

The motion to docket and dismiss the writ of error in this case was submitted by the Solicitor General May 6, 1918, on a certificate by the clerk of the District Court of the United States for the Northern District of New York of the allowance of a writ of error on December 14, 1917. At the time the motion was submitted the fact was, apparently, as shown by the exhibits to the petition herein and by later letters from him, that the United States Attorney for the Northern District of New York had agreed to an enlargement of the time for the docketing of the case in this court. The motion to docket and dismiss was made by the Solicitor General without knowledge of this fact. Later an order, consented to by the United States Attorney, was presented to Judge Ray

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and allowed May 16, 1918, *nunc pro tunc* as of March 20, 1918, further extending the time for docketing until June 15, 1918. The Government, accordingly, does not object to the motion of the plaintiffs in error to vacate the order docketing and dismissing the writ of error, and for permission now to file the record and to docket the case.

G. CARROLL TODD,
Assistant to the Attorney General.

OCTOBER, 1918.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CLINTON H. PIERCE, ANGELO CREO, Charles Z. Zeilman, Charles Nelson, Plaintiffs in Error,
v.
THE UNITED STATES OF AMERICA.
No. 727.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the Court to advance the above-entitled case on the docket for hearing at the opening of the next term.

The case involves the validity of the conviction of plaintiffs in error Pierce, Creo, and Zeilman of the crimes of (1) conspiracy under section 37 of the Criminal Code to commit an offense against the United States; that is, the offense of hindering, preventing, and delaying the execution of certain laws of the United States relating to the prosecution of the war, and (2) conspiracy under section 4, Title I, of the Espionage Act of June 15, 1917, to violate certain provisions of section 3 of the act.

It also involves the validity of the conviction of all of plaintiffs in error of the offenses of wilfully making and conveying false statements and reports with intent to interfere with the operation and success of the military and naval forces of the United States, and attempting to cause insubordination and refusal of duty in such military and naval forces, in violation of section 3 of the act.

Plaintiffs in error are at large on bail.

Opposing counsel concur in this motion.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 234

CHARLES S. FISHER, ALBERT TEEL, CHARLES A. ZELLER, CHARLES MORSE,

Plaintiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant-in-Error.

BRIEF FOR PLAINTIFFS IN ERROR.

FREDERICK A. MOHR,
Attorney for Plaintiffs in Error,
909-911 Masonic Building,
Auburn, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 234

CLINTON H. PIERCE. ANGELO CREO, CHARLES Z. ZEILMAN, CHARLES NELSON,

Plantiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR.

This cause comes up on a Writ of Error to the District Court of the United States for the Northern District of New York.

At the time the writ was obtained, Dec. 14th, 1917, the Supreme Court had not passed on the constitutionality of section three of the Act of June 15th, 1917, Chapter 30, 40 Stat. 219 (Comp. St. 1918, &10212C) known as the Espionage Act and it was to determine that question primarily that caused the plaintiffs to bring the cause direct to this court.

There remains however rulings which vitally affect the substantial rights of defendants which the court is asked to dispose of in accordance with its practice.

STATEMENT OF FACTS.

There was practically no dispute as to substantive facts in this case. These are few and simple in spite of the long record. The defendants were at the time of their arrest, August 26th, 1917, engaged in distributing from house to house in the City of Albany, a pamphlet, entitled "The Price We Pay" (p. 242). They were members of the Albany local of the Socialist Party of the State of New York. One of the methods of propaganda carried on by that party, consisted of the systematic distribution of literature and the Albany organization had made it a regular thing (fols. 516, 588, 591). The pamphlet in question was furnished by the National Headquarters in Chicago upon the order of the local organization. The order was placed by the committee having charge of the work of selection and distribution.

As to this particular pamphlet, there had been some discussion. The advisability of distributing it was questioned and on July 11th, 1917, at a meeting of the local, upon the statement of Lewis T. Hunt, a member, a lawyer who was present, that the legality of distributing it was before the U. S. Court at Baltimore, and that he advised suspension of distribution pending that decision, the assembly took action, recorded in the minutes in these words

"Motion passed not to distribute "The Price We Pay" until we know if it is legal."

Page 26, Printed Record, also Defendants Exhibit 2, p. 263.

On July 12th, the following day, the New York Call, a Socialist daily paper published in New York City contained an item headed

"Price We Pay" Not Treason, Judge Holds."

Stating in substance that Judge Rose of the United States District Court at Baltimore held the pamphlet contained nothing to justify a criminal charge against anyone who published it.

Defendants' Exhibit 6, p. 268.

Baltimore indictment, Exhibit L. (p. 253).

This indictment was a charge of obstruction to the execution of the Selective Service Act.

Following the publication of this news item, at its next meeting, July 25th, the Albany Socialist Local rescinded its action of July 11th, and called for distributors. The members present had read or learned of this decision.

Plaintiff-in-Error Pierce volunteered to help distribute and in the course of time some 5,000 pamphlets were left at his home by the literature agent.

On August 4th, 1917, the "American Socialist" published in Chicago, and the official organ of the party, published what purported to be, and which was, with some insignificant verbal changes, the opinion of Judge Rose in the Baltimore case under the caption "Famous Decision by Judge Rose."

See pp. 263-268.

This article was read by all of the defendants. It appears that Pierce was the only one of the four at the meeting of July 25th and that at his request the other defendants came to his assistance. Creo lived at his home, Zeilman lived close by and Nelson he frequently met. On this occasion he met him at a public meeting the night before and secured his help.

The distribution was had early Sunday morning, August 26th, as was the regular custom. The men met at Pierce's house and divided the streets and on

that morning the four men were arrested by the Albany police, held for the Grand Jury by U. S. Commissioner Mills of Albany. They were indicted at the October Term of the District Court, at Auburn, N. Y., tried and convicted at the same term and sentenced Nov. 17, 1917.

THE INDICTMENT

The indictment consisted of six counts. Two were dismissed, the remaining four charged the defendants as follows:

Count 1. With conspiracy to prevent, hinder and delay the execution of certain specified laws relating to the conduct of the war, among them the Selective Service Draft Act and in addition certain of the penal laws. (pp. 3-4-5-6.)

This count became reduced to a charge of conspiracy of obstruction to the Selective Service Act, and it is only that feature of it that is hereinafter discussed.

See Judge's charge p. 163.
Also fol. 660 on p. 165.

Count 2. With conspiracy to unlawfully, feloniously and wilfully attempt to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States to the injury of the United States.

Count 3. Each was individually charged with unlawfully and wilfully making. distributing and conveying to specified and other persons in Albany false reports and false statements (quoting extracts from "The Price We Pay" (p. 10 fols. 40-41-42) to the injury of the United States with the intent to inter-

fere with the military and naval forces of the United States.

Count 6 sets forth the distribution of the pamphlet as an unlawful attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and charging each defendant with the offense.

The Statute Involved.

As indicated above, though the terms of the first count covered a charge of conspiracy to obstruct many enumerated laws, the proof limited the scope of the violation to obstruction of the Selective Service Act and to an offense against section three of the Act of Congress approved June 15th, 1917, known as the "Espionage Act" the language of the section at that time (since amended) being as follows,

Section 3.

(1) "Whoever when the United States is at war shall (a) wilfully (b) make or convey false reports or false statements (c) with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and

(2) whoever when the United States is at war shall (a) wilfully cause or (b) attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States or

(3) shall wilfully obstruct the (a) recruiting or enlistment service of the United States to (b) the injury of the service, they shall be punished by a fine of not more than $1,000 or imprisonment or not

more than twenty years, or both, Also Section 4 of the Act, as follows:

"If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as said in sections, provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine."

Specifications of Error Relied On.

1. That the Trial Court erred in refusing to dismiss the indictment and to sustain the demurrer.

11. That the Court erred in denying the motion of defendants made at the conclusion of the case of the government to discharge the defendants, upon the ground that the government had failed to sustain by the evidence offered the commission of any crime or crimes charged in the indictment, or of any offense whatever against the laws of the United States.

14. That the Court erred in denying the motion of defendants herein to dismiss the complaint or to direct a verdict of acquittal at the close of the case.

15. That the Court erred in charging the Jury as follows:

> "The United States says that the defendants are presumed to know of the declaration of

war in this part of the United States and knew its purpose, and that they knew the statement as to the J. P. Morgan loans to be a false statement as to the purpose and intent in entering the war. All of that, Gentlemen is for your determination."

16. That the court erred in refusing to charge the jury as requested by the defendant, as follows:

"That there is no evidence in this case, from beginning to end, that proves or tends to prove, the falsity of the statement concerning J. P. Morgan in that circular",

17. That the Court erred in charging the Jury as follows:

"Now, Mr. Lucey claims that he has proven it, to be false, and he claims that he has proven it, on behalf of the Government to be false in this way.

The statement is that:

"Our Entry into"—meaning the entry of the United States into the war—"was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

"Now, that attributes a venal and bad motive indirectly to Congress and the President in advocating the war and approving the Declaration of War. In other words, it says here that our entry was determined by that motive and that purpose. Now, Mr. Lucey says he has proven the falsity of that by putting in evidence the Message to Congress, read to Congress by the President at the time mentionel by Mr. Magee,

in which the President stated the reasons why we should enter the war—the reasons why Congress should declare war—the reasons why Congress should declare war. Mr. Lucey claims that those are the true and correct reasons and motives, and all of the motives and reasons that led Congress—the Senate and the House in joint session—to adopt that resolution—the President to recommend and approve it."

"Now, it is for you to say, Gentlemen. Is that a false statement? Has Mr. Lucey proved to your satisfaction beyond a reasonable doubt, that that statement is false?

18. That the Court erred in refusing the request of the defendant to charge the jury as follows:

"That the statement in the pamphlet just referred to as to Morgan & Co.'s loans to the allies, which might have been repudiated, was an opinion which the defendant had a right to hold, and to circulate, regardless of its truth or falsity, of its correctness or incorrectness, regardless of the reasons stated either in the President's Message or in the Declaration of War by Congress."

20. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

"That so far as that statement is concerned and all other statements in the pamphlet, that they were justified in accepting the statements, and conclusions, and opinions of the writer without regard to their truth or falsity without regard to their correctness or incorrectness, and if they circulated and accepted those opinions passing themselves upon the authenticity and

reliability of the source, that they were without fault."

21. That the Court erred in charging the jury as follows:

"Unless they knew, or were informed that the statements contained therein were true, it was their duty, in view of the common knowledge, to make some investigation before putting it out. When they put it out, they adopted it. It may have been their duty to have someone make some investigation, and to get some information as to whether it was true or false, in view of all the information they had and the conditions surrounding them. It is for the jury to say—to find whether or not they were justified in putting it out without any inquiry, or any actual knowledge on the subject. I have already charged the jury that—they must know it to be false from their general knowledge or otherwise, and I repeat that charge."

22. That the Court erred in refusing to charge the jury in substance, that the fact that there is no evidence in the case that any person had received a pamphlet who had been accepted under the Selective Draft Act or in the Regular Army, had nothing to do with the question as to whether or not defendants had offended against the Espionage Law.

23. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

My client requests that Your Honor charge the jury that if the defendants, on or about the 12th day of July, 1917, read a newspaper item in a newspaper called "The New York Call," to the effect that it had been decided by a Feder-

al Court Judge at Baltimore, in a case before him, that the distribution of the paper called "The Price We Pay" was legal, then they were justified in circulating that paper."

24. That the Court erred in refusing to charge the jury as requested by the defendants, as follows:

"The Government must establish beyond a reasonable doubt that the defendants believed these statements to be false, and that their distribution of them was wilfull."

25. That the Court erred in refusing to charge the Jury as requested by the defendants, as follows:

"That the Constitution guarantees the right of freedom of speech and the press, and under this constitutional guarantee the defendant had the right to distribute "The Price We Pay."

POINT I.

The indictment was insufficient. It was error to dismiss the demurrer.

(1). The indictment fails to state the facts and circumstances upon which the allegation of conspiracy rests.

It is faulty because of indefiniteness. It specifies neither time nor place of the alleged conspiracy with such particularity that the defendants could not possibly intelligently prepare a defense. It details no facts or circumstances from which could be inferred that community and communion of unlawful purpose or motive necessary to make out the crime. The first count sets up a conspiracy "throughout the time from April 6th to October 2nd," and sets forth the overt act as of August 26th. Such a statement as that can mean nothing to a defendant. The time

of the conspiracy should at least be laid before the time of the overt act.

U. S. vs. Milner, 36 Fed. Reports 890.

Under this indictment should other proceedings be taken against them for a similar offense, from this record they would be unable to plead a former acquittal or conviction.

Cochran and Sayre vs. United States, 157 U. S. 286.

Sheridan vs. United States, 236 Fed. 305-310.

It does not even allege an agreement to circulate the particular pamphlet the distribution of which is stated to be in execution of their plan.

It sets forth as the method adopted "personal solicitation speeches and various pamphlets," but does not state the subject or content of either solicitation, speeches or pamphlets.

It does not even say that the defendants knew the contents of the circular.

The whole structure of the alleged conspiracy rests upon the overt act and consists of speculative deductions from that admitted fact.

The charge cannot be aided or established by setting forth the overt act.

United States vs. Britton, 108 U. S. 199.

The indictment should set forth the facts and circumstances upon which the allegations of conspiracy rests.

Haynes vs. United States, 101 Fed. 818.

Pettibone vs. United States, 148 United States 197.

(2) The indictment fails to set forth the facts or circumstances showing unlawful motive, or purpose, called in the statute "intent."

The Court's attention is called to the novel character of the essential criminal ingredient of the crime created by this statute. It is really the motive that is made criminal. Motive as an inducement to intent. Per se the substance of the publication was lawful and the method of the publication was lawful. It was the doing of a legal act by legal means. The base of the statute rests upon the psychical element to wit: The expectation and desire of the actor that certain conduct on the part of persons engaged in military service will be produced by his appeal.

This psychological fact might be inferred from the nature of the statements made it is respectfully submitted that the contents of the circular carry no conviction of the criminal aims of either the writer or of the defendants.

In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven.

Hibbard vs. United States, 172 Federal 66.

(3) The indictment contains no statement of facts and circumstances showing a *clear and present danger* that the distribution of the pamphlet would bring about the substantive evils that congress sought to prevent by the enactment of this law.

Assuming the presence of the forbidden aims in minds of the defendants this court has ruled that such a mental state must concur with a situation in

which the logical and natural effect of the written or spoken words would precipitate the conduct and consequences set forth in the statute.

Schenck vs. United States, 249 U. S., 47.

Herman vs. United States, 257 Federal 601.

Wills vs. United States, 257 Federal 605.

Wolf vs. United States, 259 Federal 388.

Said the Court in the Wolf vs. United States (supra).

"Words which in their very nature or which under the circumstances of their utterance, could not apparently have a tendency to cause such interference are without the statute. The intent alone with which they were uttered cannot alone make them harmful.

"These two elements (~~intent~~ and circumstance) are essential to the offense and therefor to a proper charge of the offense. The effective way of pleading the character of the words is setting them forth literally or substantially. If they carried to their hearers any hidden or special meaning that should be alleged. The effective way of pleading the circumstances of utterance is by alleging such as show that the utterance was made to actual or possible members of such military forces or under conditions when it would apparently reach or operate upon such persons."

See also

Balbas vs. United States, 257 Federal 17.

(4). The nature of the statements contained were not such as would naturally produce the forbidden consequences.

Admitting the presence of criminal purpose, coupled with such juxtaposition of circumstances as will permit congress to limit the right to freedom of speech and escape the constitutional prohibition, the language itself must possess such character as will clearly show it to be calculated to produce the effects contemplated in the law.

Schenck vs. United States, 249 U. S. 47.
Wolf vs. United States, 259 Federal 388.

It is respectfully submitted that in the case at bar, no such expressions appear.

Surely the test will not be the effect upon the unregulated or the distorted mind, but the effect upon the person of average intelligence capable of normal judgment

Briefly characterizing the contents of "The Price We Pay" it is not fair to say that it is a highly figurative perhaps exaggerated and lurid description of the horrors of war? It is an argument in support of the proposition that war is a product or by-product of the existing economic order.

That the material interests of the competitive groups of financiers and directors of industry in the

various countries are large if not the determining factors in bringing about particular wars and that the present war was not exception to the rule. That the only remedy for this state of affairs is the substitution of an improved economic system designated but not described as "Socialism." Does not the the article hold up the present war as a horrible example of the effects of what the writer calls "capitalism" and upbraid the reader for his blindness and stupidity for supporting a system, which in the writer's opinion was responsible for the appalling calamity that befell the world and in which penalty he must now share.

Is not it clearly the purport of the article an attempt to interest the reader in the social remedy of the writer? At no place in the pamphlet is there advice, suggestion or encouragement that the reader should engage in the attempt to resist the preparation aims of the nation. Rather the futility of such a course is the thought.

It is only by the most strained and artificial construction or by opinions rendered under stress of bias or passion that it could be said that the *only* construction that could be placed on the purpose of the defendants in circulating this pamphlet is the unlawful one

Applying the rule of the Debs case, to wit: that it must appear that the *manifest intent* of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was directly given the immunity of the general theme may not be enough to protect the speech," it is submitted that no such manifest intent is apparent in the language of the

article, nor is encouragement to unlawful conduct given directly or indirectly.

Construed in the light most favorable to the prosecution it is submitted that the nature of the article is as consistent with innocence as with guilt, as a matter of law.

Scroggins vs. United States, 255 Federal 825.

POINT II.

The trial court erred in refusing to dismiss the indictment and discharge the defendants on motion made at the end of the government's case.

The trial court erred in refusing to dismiss the counts charging conspiracy against the defendants.

There was a complete failure of proof by the government in every material element of the crimes charged.

(1). There was no proof of conspiracy.

(2). There was no proof of criminal purpose or intent.

(3). There was no proof of the falsity of the statements circulated.

(4). No proof of knowledge of the falsity on the part of defendants.

(5). There was no proof of such circumstances existing at the time of the circulation of pamphlet as to create a clear and present danger that the substantive evils would result which Congress sought to prevent.

(6). The pamphlet itself was not of such a nature as, had all the other elements been present that

it could legitimately be construed as effective in bringing about the prohibited consequences.

The statute is highly penal and requires a high degree of clear and convincing testimony.

People vs. Davis, 1 Wheeler Cr. Cases 225.

Should the court decide that the indictment was sufficient, the authorities and argument as to the insufficiency of the indictment are now urged to support our position that the evidence was insufficient on every material point.

(a). *There was no proof of any conspiracy to obstruct, hinder or prevent the execution of Selective Draft Law, nor any proof of any conspiracy to produce the forbidden consequence of the Espionage Act.*

This proof must rest upon evidence of such strength and cogency as would leave no reasonable doubt that the defendant had the forbidden intent in their minds. The record is as devoid of testimony as a piece of white paper on this point.

The government placed upon the witness stand Edward F. Smith, the Secretary of the Albany Socialist Local. He could have refused to testify as a matter of right, but he took the stand and disclosed all there was to tell about the preliminary facts leading up to the distribution of the leaflet.

The young man explained the method by which the literature of agitation came into the organization's hands, and how it was distributed to the people.

At page 62-66 of the printed record, he tells of the discussion at the meeting of July 11th, that resulted in the resolution to withhold the pamphlet until the U. S. Court at Baltimore had ruled upon its legality.

At page 67 he begins the story of the discussion at the meeting of July 25th, that resulted in the rescinding of the former resolution and of the decision to distribute the pamphlet.

At this meeting only Mr. Pierce of the defendants, was present. Pierce volunteered to distribute the pamphlet as did the witness.

It is evident that this evidence was not entirely satisfactory to this prosecution and long and detailed cross examination of the defendants, (who freely testified in their own defense) was engaged for the purpose of establishing a meeting together at or near the entrance to Pierce's home on the early morning of August 26th for the purpose of a conference.

See

Creo, page 130,
Nelson, page 130 pp. 543-544,
Zeilman, page 148.

This examination disclosed the fact that the distribution was taken as any ordinary event in their system of distribution, and the only agreement entered into related to the allotment of the streets.

Thus the only fact upon which the proof of conspiracy to bring about the prohibited results is that the defendants distributed the pamphlets together.

Not a shred of evidence showing any interchange of ideas upon which a common wrongful or illegal purpose could be predicated.

~~There was no evidence that any of the defendants~~

~~had even read the pamphlet, prior to its distribution, or know its contents.~~

(*b*). *There was no proof of any false statements in the pamphlet.*

The government took the position that the language of the pamphlet was intended to be and should be understood only in the literal sense.

It undertook to prove the falsity of certain specific statement.

The first statement appeared in the first subdivision of the circular (fol. 968) reading as follows:

> "Conscription is upon us, the draft law is a fact! "Unto your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army."

Major Louis B. Lawton was called as a witness. He was at the time assigned to the enlistment branch of the service as recruiting officer at Syracuse. Through him the prosecution sought to prove that the use of the word recruiting was limited to the enlistment work and that the word "impress" in connection with the word recruiting constituted a false statement.

This testimony appears on pages 73 to 80 of the printed record, and the whole of it is but an attempt to literalize highly figurative speech and to limit words of varied signification in common speech to strained, artificial and technical meaning. But this court has already decided in *Schenck vs. United States* that "recruiting" is not so limited and points out that the term in section 3 of the Draft act is used for conscription distinct from the enlistment branch.

The next and probably most important of the alleged false statement in the pamphlet consists of this paragraph:

> "Our entry into it was determined by the certainty that if the allies do not win J. P. Morgan's loans to the Allies will be repudiated and those American investors who bit upon his promise would be hooked."

To establish the above statement to be false the government resorted to the President's message to Congress of April 2, 1917.

The government with the approval of the court (assignment of error No. 17) held this instrument to be evidence establishing the falsity of the statement in question. (Note, not the fallacy of its reasoning).

It is urged that such a contention violates every principle of proof known to the law and denies to the accused his most sacred rights, guaranteed under the constitution.

The defendants had no opportunity of cross examination. To admit its validity for the purpose offered would be to assert the dictrine of executive infallibility.

That powerful and convincing utterance spoke the sentiments counsel believes of every discerning and informed mind in the entire nation. But that did not deprive the humblest and most ignorant citizen in the country, though he stood alone, of the right to take issue with the president, either as to the accuracy of his statement or the soundness of his logic. The citizen is the sovereign.

Neither as a matter of sound reasoning from historical data, could the president's message be said to be inconsistent with the broader generalization

that the great conflict had its roots in the struggle of material interests typified in the circular under the name of America's leading financial institution.

Mention should be made of the statement:

> "The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply for gamblers."

This statement might possibly be a ground of action of slander against the publisher of the pamphlet unless the writer could explain it away, but it is submitted that to offer such testimony as the Assistant District Attorney gave to disprove it (see page 80, Printed Record) was improper.

It apparently had its origin in a news item of some sort that furnished the writer with a text upon which to emphasize his view that the Attorney General was not giving his attention to the really important violations. But there is no evidence that the defendants did not believe the statement, and wilfully circulated it in the face of such disbelief.

(*c*). *There was no proof from which the unlawful purpose of the defendants could be inferred.*

It may not be proper to omit calling the Court's attention to the disputed conversation between Scully and the defendant Pierce in Grell's saloon in which Scully, a reporter, who testified he was a member of the American Protective League, and who said that on an occasion, prior to August 21st, Pierce gave him a pamphlet and said: "I could be arrested for treason for giving you this if you were sucker enough to squeal."

The only conceivable purpose for which this testimony could be received (over objection and exception) was to show guilty intent on Pierce's part.

Pages 104-105.

Pierce denies this (page 141) and in view of the fact that Pierce distributed the circulars from house to house, the implication of secret distribution is foolish.

But in any event the phrase has no meaning except as a joke. Nor could it be evidence against the other defendants.

The legal quality of the acts covered by the Espionage Law, was no different as to element of intent, than those made under a charge of conspiracy to obstruct the draft. Such were the charges in the Baker-Wilhide indictment, where the defendants distributed just as defendants at bar did, this self-same pamphlet. Judge Rose's charge to the jury is reported in the Printed Record of this case at page 263 as defendant's exhibit (also prosecution's exhibit K).

The Court said:

> "The judicial determination of the matter is that in whatever form they put what they say or do whether that of advocating the principles of any political party, Republicans, Democratic, Prohibitionist, Socialist or under any other guise whatsoever, it is an offense to do anything with an intent to bring about a violation of the law, but the commission of that offense must be proved, the intent must be established by evidence that will justify a jury in holding that it was made out beyond a reasonable doubt, and

in this case there is no such evidence. Whereupon he directed a verdict of not guilty."

POINT III.

The defendants fully justified their acts by establishing lawful purpose and innocent intent. The refusal of the court to direct a verdict for the defendants and set aside the verdict was error.

It is conceded that no conduct has such absolute privilege as to justify ~~as to~~ all possible schemes of which it may be a part.

Aikens vs. Wisconsin, 195 U. S. 204.

The defendants took the stand, not to deny but to explain the acts charged against them. It is urged upon the court that uncontradicted circumstances under which this pamphlet was circulated by the defendants demonstrates that in their hearts was no thought of producing in the war forces of the United States disaffection of any character.

All of the defendants took the stand and testified in their own behalf. Zeilman is a native born citizen, the son of a Civil War veteran. He had at the time a son in college who was in the draft. He was a zealous Socialist and always to be relied on for work. He did not attend the meetings because his work prevented him.

Pierce is a native born American and for twenty years an active party member. He opposed the distribution of this pamphlet pending the outcome of the Baker and Wilhide case in Baltimore, but after the favorable dcision by Judge Rose on the pamphlet he supported the proposal to distribute and volunteered to help distribute.

Creo is a naturalized Italian. He had a brother in the Italian army. He had read the "Price We Pay" in April or May and says he remembered practically what it was about.

Nelson is a young painter, born in Russia. Came to America seven years before and had declared his intention to become a citizen. He was registered. He had a brother in the service. He had never distributed before, and volunteered the night before when Pierce asked him about it.

All testify that their sole purpose was to promote the cause of Socialism, and to increase the membership of the Socialist Party. That they had no knowledge or belief that the pamphlet contained false statements.

Their work was largely mechanical and routine as party workers.

The action of the organization already related indicates the anxiety of the members to obey the law.

The indictment of Baker and Wilhide in Baltimore was the same offence as Count One of the instant cause.

Judge Rose, the presiding Judge, had directed a verdict for the defendants in that case, and dismissed and indictment and said:

> "Every man has a perfect right to any opinion he may see fit to form about any proposed law, or about any law that is on the statute books. Any man may do anything, in itself legal, to secure the repeal of any law in force. To that end he may make any argument that commends itself to his reason and judgment against the policy of any particular law, wheth-

er it be a law for a selective draft or any other, and he is not answerable for the wisdom of his arguments."

It is respectfully submitted that indictment in the cause at bar sets forth no additional fact or circumstance not contained in the Baker-Wilhide indictment from which it may properly be inferred that their conduct was animated by a different purpose.

POINT IV.

The portions of the court's charge excepted to and specified in the assignment of errors and the refusals to charge specified were erroneous and substantially prejudiced the defendants

To discuss in detail these assignments of error would be but repetition, as many of the questions raised have been treated in the foregoing argument.

Counsel desires, however, to direct the court's attention to assignment 22, in which the Court in substance refused to charge the jury that the fact that there is no evidence in the case that any person had received a pamphlet had been accepted under the Draft Act or in the regular army was immaterial.

Defendants contend that such fact is very material on the question of intent, or motive, and as an element in negativing that set of circumstances, under which tha utterance of spoken or written language would bring such conduct otherwise lawful, within the statute.

The principle upon which these exceptions rest, is that this pamphlet is but a criticism of the political and economic structure of society illustrated from current events and historical data. Whether well or

ill done, is immaterial. That in no sense can it be said that the document in whole or in part can be within the language of the statute as to be a "false report of a false statement."

That to so include it, and to bring within either the spirit or letter of the statute expressions of the sort here made under the circumstances in which they were made to give such a construction to the law as would work a violation of the First Amendment to the constitution.

The strict construction, indicated in the recent opinions of this court, rigidly applied, will prevent this statute from becoming a drag net that will ensnare both the innocent and guilty, leaving the innocent to get out the best way they can.

The right of the government to adopt such measures as will permit it to execute the great enterprises to which the people of these States have given their approval cannot be disputed.

But in the exercise of that right, the government itself may not forget the great primary object for which it was created.

Among the great principles of individual freedom to preserve which our government was instituted, the most sacred and important is the right of free expression of opinion.

So solicitous were our fathers for the preservation of this right in all its integrity from the invasion of Congress, that the framers of the constitution incorporated an ABSOLUTE PROHIBITION upon Congress to limit or abridge it.

It is submitted that the statute construed in the light of the First Amendment does not include the

acts of the defendants in publishing the contents of this pamphlet, under the circumstances in this case.

POINT V.

The judgment should be reversed and a new trial ordered.

Respectfully submitted,
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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

CLINTON H. PIERCE, ANGELO CREO, Charles Z. Zeilman, Charles Nelson, plaintiffs in error,

v.

THE UNITED STATES OF AMERICA.

No. ——.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The indictment contained six counts (Rec. 2–15).

Count 1 charged a conspiracy to interfere with, prevent, hinder, and delay the execution of certain laws of the United States specifically set out therein. This count does not seem to be based on any Federal statute. Section 6 of the Criminal Code may have been had in mind, but the essential words "by force" are omitted. The Government will not, therefore, press count 1.

Count 2 charged a conspiracy to violate section 3 of the so-called espionage act in attempting to cause

insubordination, disloyalty, and refusal of duty in the military forces of the United States by solicitations and speeches in the city of Albany on August 26, 1917, and by distributing a pamphlet entitled "The Price We Pay" (Government Exhibit I, Rec. 242) at the same place and time; also that the acts set forth in count 2 of the indictment would obstruct the recruiting and enlistment service of the United States, to the injury of said service and the United States (Rec. 33).

Count 6 charged the actual commission of the offense, conspiring to commit which was one of the offenses charged in count 2 (Rec. 33).

Count 3 charged a violation of section 3 of the espionage act in making and conveying false reports and false statements with intent to interfere with the operation and success of the military forces of the United States at a time when it was at war by the circulation of the said pamphlet, The Price We Pay.

Counts 4 and 5 were struck out by agreement (Rec. 150).

A demurrer (Rec. 16) on the ground that the indictment did not charge an offense against the United States, that it was not sufficiently definite and specific, and that the circulation of The Price We Pay was not an offense, was overruled (Rec. 18–39).

A bill showing the particulars of the solicitations and speeches and the language used was denied (Rec. 43–49). After a trial at which the defendants

all took the stand in their own defense, the defendants Pierce, Creo, and Zeilman were found guilty on the first, second, third, and sixth counts, and the defendant Nelson on the third only (Rec. 238). The defendants were thereupon sentenced, Pierce to ten months on each count, Creo to one year on each count, Zeilman to eight months on each count, and Nelson to four months (Rec. 274, 275). To these judgments the present writ of error has been sued out.

ASSIGNMENTS OF ERROR.

The assignments of error (Rec. 276–285) number 31. Certain of them may be dismissed from consideration at once as being entirely irrelevant or baseless, viz, 2, 3, and 5, that the indictment does not state an offense under certain named statutes, for the Government admits that it does not; the last paragraph of 11, 25, 26, 27, 28, 31, and 32 because they deny the constitutionality of the selective-draft act and of section 3 of the espionage act.

Assignments 6 and 7 and assignments 8, 9, and 10 relating to the refusal of the court to require a bill of particulars, a list of the witnesses, a severance of the trials, and an election by the Government, all relate to matters within the discretion of the trial court, not reviewable on writ of error unless there has been an abuse of discretion. *Rosen* v. *United States*, 161 U. S. 29, 35; *United States* v. *Ball*, 163 U. S. 662, 672; *United States* v. *Ban Duzee*, 140 U. S. 169, 173.

There was plainly no abuse of discretion in the present case. As to the bill of particulars, the indictment specified the date, August 26, and the place, Albany, N. Y., of the offense. It gave the title of the pamphlet whose circulation was the gravamen of the charge and the names of some of the persons to whom it was distributed. The court did not abuse its discretion in considering this sufficient.

The same is true of the refusal to require the United States Attorney to furnish a list of witnesses.

As to the severance and election, the indictment charged the same substantive facts against all the defendants done at the same time and place. The charges of a joint offense did not, therefore differ in respect of intimate connection from the charges of conspiracy, and the court could properly treat them on the same footing for purposes of severance and election.

Assignments 12 and 13 relate to the admission and exclusion of testimony, but the only specification is as to the testimony of Scully (Rec. 102–108) to the statement made by Defendant Pierce, the objection to the testimony being that it was not directed to one of the formal overt acts. This assignment does not seem to require consideration.

Assignment 22 that the court erred in refusing to charge the jury that there was no evidence that any person had received a pamphlet who had been accepted under the selective draft act or in the Regular Army had nothing to do with the question whether

or not defendants had offended against the espionage law, is meaningless, but the reference is apparently to Record 220, where the court merely stated that it made no difference, under the charge of conspiring to attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States (count 2), or of attempting to do this (count 6), whether the pamphlet entitled "The Price We Pay" had been actually distributed to persons at that time inducted into the mulitary service or not.

Assignments 15 to 21 relate to the refusal of the court to charge certain things relative to the alleged false statements and to his actual charge as to these matters.

Assignment 23 relates to a refusal to charge that, if the defendants in circulating the pamphlet The Price We Pay relied upon the decision of a Federal judge in another case they were as matter of law justified in their action.

Assignment 24 must be read in connection with Record 223, 224. When so read it appears to be both misleading and trivial and may be disregarded.

The other assignments not specifically noted above raise the question whether the defendants were rightfully convicted or not.

ARGUMENT.

I.

THE EVIDENCE CLEARLY ESTABLISHES THAT THE DEFENDANTS CONSPIRED TO DISTRIBUTE "THE PRICE WE PAY" AND ACTUALLY DISTRIBUTED IT.

(*a*) The defendants were all members of the local Albany lodge of the National Socialist Party (Rec. 119, 120, as to Creo, 135 as to Nelson, 139 as to Pierce, 145 as to Zeilman), the publisher of the pamphlet (Rec. 252). A meeting of this lodge was held on July 11, 1917, at which, after a discussion as to the wisdom of distributing the pamphlet in view of its supposed conflict with the Federal law, it was resolved it should not be distributed "until we know if it is legal." (Rec. 61–65, 263.) On July 25 another meeting was held, where, after a discussion of Judge Rose's decision at Baltimore, it was decided to distribute it and volunteers were called for this work (Rec. 70, 263). The defendant Pierce was at this meeting and volunteered (Rec. 70), and the defendant Zeilman was mentioned as one who always distributed (*ibid.*). The defendants thereupon met on August 26, 1917, at Pierce's house early in the morning, received the pamphlets, arranged the route, and proceeded to distribute them indiscriminately through the city, handing them to everyone and leaving them at every house (Rec. 125, 126, 136, 137, 81–84). All of this was admitted by the defendants themselves on the witness stand, and the only justification they asserted was that they thought their

action legal after Judge Rose's decision, and that they did not intend by the distribution to obstruct recruiting or interfere with the operations of the military forces, but merely to promote and aid the cause of socialism. The evidence, therefore, demonstrated conclusively that the defendants entered into a conspiracy to circulate the pamphlet entitled The Price We Pay and that they actually circulated it indiscriminately and extensively.

II.

THE JURY WAS JUSTIFIED IN FINDING THAT SUCH CIRCULATION OF THIS PAMPHLET CONSTITUTED AN ATTEMPT TO CAUSE INSUBORDINATION AND DISLOYALTY IN THE MILITARY FORCES AND AN OBSTRUCTION OF RECRUITING AND ENLISTMENT UNDER THE SECOND AND SIXTH COUNTS.

(*a*) There was no evidence of any acts by the defendants other than those connected with the circulation of the pamphlet entitled "The Price We Pay."

(*b*) It is not necessary, since the decisions of this court in the *Schenck*, *Frohwerk*, and *Debs Cases*, to analyze this pamphlet in detail, because it is of the same general character as, if indeed it be not precisely similar to, the matter under consideration in those cases, and especially in the *Schenck* and *Frohwerk Cases*. It speaks of recruiting and of service in the military forces in the most passionate and unmeasured terms as the greatest of all evils; it

denounces the war as commercialism bent merely on deriving pecuniary profit from the slaughter of the poor and helpless; it denies that it is being waged for the preservation of democracy or of the rights of small nations; it asserts that Ireland has suffered more from England in three centuries than Belgium did from Germany in three years, etc. In addition, in the case at bar there was evidence of direct distribution of the pamphlet to registered persons (Rec. 81, 86, 98, 100, 101, 108) and the statement of one of these persons as to the impression made on him by reading it (Rec. 87).

Nor are the decisions of this court in the *Schenck*, *Frohwerk*, and *Debs Cases* any the less applicable, if the second and sixth counts be taken as charging a conspiracy and an attempt, not to obstruct recruiting, but merely to cause insubordination, etc., in the military service. The connection in a legal sense between the circulation of the pamphlet and the offense denounced by the statute would be the same in either case. It is to be noted that an *attempt* to cause insubordination, etc., was punished in the original form of section 3 of the espionage act (the only form involved in the *Schenck Case*, 249 U. S. 47, 58), a result only reached as to obstructing recruiting by the amendment of May 16, 1918, under which Debs was indicted (249 U. S. 212). Clearly pamphlets which a jury might find obstructed recruiting, they might with equal propriety find an attempt to cause insubordination, etc. This is di-

rectly held by Judge Learned Hand, with the concurrence of Judge A. N. Hand, in *United States* v. *Eastman*, 252 Fed. 232, 233, where he says:

> "The principle now established, and for that matter, recognized elsewhere in the district courts, depends upon the likelihood of the words to produce the result, coupled with the specific intents. So long as that remains the rule, the resulting insubordination is on the same basis as the resulting impediment to enlistment."

This view has also at least the tacit approval of this court in the *Schenck case*, for the indictment there charged a conspiracy both to attempt to cause insubordination, etc., and to obstruct recruiting (249 U. S. 48, 49), and this court dealt with the matter generally, not deeming it necessary to limit or qualify its remarks.

As stated above, the only justification claimed by the defendants is—

1. That they relied upon a decision of Judge Rose of the District of Maryland to the effect that circulation of The Price We Pay was not illegal.

2. That their intent in circulating the pamphlet was not to stir up insubordination, obstruct recruiting, or interfere with military operations, but to promote the cause of socialism.

As to the first point, the defendants' request to charge was that *the reading* by them of Judge Rose's opinion constituted justification for their acts *as matter of law* (Rec. 220, 221). The court admitted

Judge Rose's opinion in evidence and charged that it could be considered as bearing on defendants' intent (Rec. 191–194, 222). This was clearly all they were entitled to. Judge Rose's opinion did not deal with the statute under which the defendants were indicted, viz, the espionage act, but with a conspiracy to violate the selective draft act by bringing about refusal to register (Rec. 253), an entirely different matter. Certainly *the reading* of this decision did not justify, *as a matter of law*, a violation of the espionage act, which was not under consideration by Judge Rose, and the jury were not bound to consider it as showing defendants had no criminal intent as matter of fact.

As to the second point, it is entirely governed by the decision of this court in the *Debs case*, 249 U. S. 211, 212, 213, where it is said:

> "The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With this we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech."

In the case at bar the jury had a right to consider the peculiar circumstances of time and place under which the pamphlet was circulated by these defendants, as stated above in this brief, and whether,

therefore, the plea of socialism was not a mere cover for the real purpose, viz, to oppose the war and all its works.

III.

THE JURY WERE JUSTIFIED IN FINDING THAT THE CIRCULATION OF "THE PRICE WE PAY" CONSTITUTED THE CONVEYING OF FALSE STATEMENTS WITH INTENT TO INTERFERE WITH THE OPERATION AND SUCCESS OF THE MILITARY FORCES UNDER COUNT THREE.

(*a*) What has been said above under paragraph II (*b*), viz, that the jury were entitled to find the circulation of this pamphlet an attempt to cause insubordination and disloyalty, and an obstruction of recruiting, applies with equal force to that portion of count three which alleges an intent to interfere with the operation and success of the military forces. If the circulation of the pamphlet at the time and in the manner shown at the trial might have the natural and proximate effect to cause insubordination and disloyalty in the military forces and to obstruct recruiting, it might equally have the natural and proximate effect to interfere with military operations and success. In this respect, at any rate, the first clause of section 3 of the espionage act does not differ from the last two, since to cause insubordination or to obstruct recruiting necessarily interferes with the operation and success of the military forces. To destroy the morale of an army is to destroy that army, and this is as applicable to those in reserve

behind the line as it is to those actually engaged in conflict.

(*b*) The statute, in addition to the intent referred to in the preceding paragraph, fixes the class of persons subject to its provisions as those who "make or convey false statements." It is necessary, therefore, to determine the meaning of the phrase" false statements" as used in the act.

It is conceived that the following conditions must concur to constitute such a "false statement:"

1. It must be a statement of a *fact*, as distinguished from a statement of the maker's opinion, or of his conclusion from actual facts.

2. It must be in fact false, i. e., it must state the facts as being other than they actually are or were.

If the statement be in fact true, it is not within the statute though the maker or conveyer believed it to be false, and made or conveyed it with intent to interfere with the operations and success of the military forces.

3. The maker or conveyer must know the statement to be false, or, being under a duty to endeavor to ascertain the truth, must, in disregard of such duty, make or convey the statement recklessly, without any effort to ascertain the truth.

A mental attitude of indifference to the truth or falsity of the statement is the legal equivalent of knowledge of its falsity. It has been frequently so held in cases even of manslaughter, e. g. *Rex* v. *Long*, 4 Car. & Payne, 423, 440, 441.

(c) The existence of these three conditions in the case at bar the United States was bound to establish beyond a reasonable doubt, and it may be assumed that it was for the jury to determine whether they had done so or not. *Hickson* v. *U. S.* 258 Fed. 867, 869. The trial court in effect charged that the burden was on the United States and that the questions were ones for the jury, as to all three conditions.

If, therefore, the jury, on the evidence presented to them, and under the established rules of law relating to their powers, were justified in finding that the United States had properly established the existence of the conditions referred to, their verdict will not be interfered with on error.

The particular statements in The Price We Pay which were alleged in the indictment to be false and presented at the trial as such were the following:

> (1) "Into your homes recruiting officers are coming. They will take your sons of military age and *impress* them into the Army.
>
> "And still the recruiting officers will come, seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."
>
> (2) "The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from gamblers."
>
> (3) "Our entry into it" (meaning the entry of the United States into the war with Germany) "was determined by the certainty that

> if the Allies did not win, J. P. Morgan's loans to the Allies will be repudiated and those American investors who bit on his promises would be hooked."

As to the first statement, Louis B. Lawton, an Army officer in charge of recruiting at Syracuse, N. Y., testified that recruiting had to do with the volunteer systems and not with the draft; that recruiting officers did not "impress" men, and that nobody was whipped, lashed, or hurled into any branch of the military service (Rec. 77). This was the only evidence offered of the falsity of statement 1, and manifestly it was insufficient. The statement refers to the draft and can not be taken to refer to volunteering by some restricted meaning of the word "recruiting." The case, therefore, is left without any direct testimony on behalf of the United States to the falsity of statement 1, and the question, therefore, arises whether the jury, acting on their own general knowledge, could find the statement false. It is not necessary to discuss this question as to statement 1, however, for we think this statement can not fairly be considered as anything more than the opinion or conclusion of the writer, though expressed in a dogmatic, exaggerated style; or if it be considered a statement of fact, it is manifestly true.

As to statement 2, the Assistant United States Attorney testified that no Federal law made it a crime for a man not to stand up when the Star Spangled Banner was played and that consequently

no one had been prosecuted therefor (Rec. 80, 81). This, being uncontradicted, was sufficient to prove the falsity of statement 2 if it was a statement of fact. Now whether the statement was one which was meant as a statement of fact and to be understood as such or was to be considered as rhetoric and irony was a matter for the jury. If the jury thought it was only rhetoric, they might properly think the rhetoric dangerous and seditious and the irony far-fetched, but this would not be sufficient under the third count. On the other hand, if they thought it was intended to be uttered as a statement of fact to be believed as such, it would support the charge. If the statements as to sending persons to prison for not standing up when the Star Spangled Banner is played and not protecting the food supply from gamblers are to be taken literally, then the statement as to the Attorney General's personal activity on the one side and lack of time on the other must receive the same literal interpretation; and if the jury believed they were uttered as fact with the purpose of being so taken by those who heard or read them they would support the third count.

As to statement 3, the principal evidence to its falsity was the President's message to Congress giving his reasons why war should be declared on Germany. We admit that this message is not *conclusive* evidence of the causes of the war, just as President Polk's messages could not be taken as *conclusive* evidence of the causes of the Mexican War. But such public

documents are, nevertheless, *relevant* evidence as to the truth or falsity of statements of historic fact, because they are the statements of public men whose opinions and actions themselves make history.

In considering the causes of the Revolutionary War, the War of 1812, the Mexican War, the Civil War, or the Spanish War, the statements of public men in a position to know the facts are clearly relevant to the issue, and when the statement is made by the President, who has complete charge of foreign relations and is Commander in Chief of the Army and Navy, it is not merely relevant—it is of great weight. Furthermore, it is clear, as it is also necessary, that a jury may take judicial notice of facts of general knowledge and interest, equally, within their sphere, with the judge. (See Thayer on Evidence, p. 296 et seq. and cases cited, especially *Commonwealth* v. *Peckham*, 2 Gray 514.) This right of the jury to take judicial notice has peculiar application to the issue whether a statement of a fact of general importance and interest is true or false. If such statement be that the earth is flat, it would be a travesty of judicial trial to summon witnesses to prove it round. So as to statements of striking, widely interesting, political facts. The statement that the Civil War was caused by the machinations of northern financiers who desired to ruin the Lancashire cotton-mill owners, and thus gain a world-wide monopoly of the industry for themselves, could not, perhaps, be proved false by witnesses before a jury

confined to testimony competent in our courts. In this matter, as in all others, the law, while it adopts, so far as possible, the method of science, is a practical business dealing with the complex actions and intents of human beings. The necessity of its being drives it to decide matters brought before it as soon as possible and with the best machinery at hand. If the question stated above, viz, whether the Civil War was caused by the conspiracy of northern financiers, is duly made an issue in the trial of a cause, the law must determine it. Can not the law determine it by assuming the power to take judicial notice of the subject, according to the best lights it has, even though the conclusion reached may, in the light of further facts subsequently discovered, prove to be incorrect?

We submit that it can; that the law as a busy, working, practical matter must take judicial notice of things which are well established according to the standard of the times in which a particular case arises, and must administer justice accordingly. Or, to carry the argument a step further, *some* statements may be made as to current political matters which are so wholly beyond any actual condition of affairs as to be manifestly false, according to the standards of the time and to the general environment under which they were made.

If that be true, we claim that a jury may take judicial notice of the truth or falsity of such matters. It has as much right to decide whether such state-

ments are true or false as the maker of them had to issue them dogmatically as statements of fact anent current political subjects. The law, working practically, must allow the jury an equal knowledge as to the truth or falsity of the statement to that assumed by the maker of it.

If the above be correct, there seems to be very little more to say on this phase of the case.

Assignments of errors 18 and 19 claim that statement 3 was merely an expression of opinion or of a conclusion reached from data duly considered. But this seems idle. So close is the connection between the human being as a center of action and utterance, and the actions and utterances themselves, that it is always possible to claim, with plausibility, that what appears to be a statement of fact is merely what the maker of the statement happened, at the particular moment of making it, to think, or opine, or conclude. The law, however, works on a system of ordinary understanding, and if a statement would seem to most persons to be a statement of fact, and the law is compelled to decide whether it is or not, it will take the view of the average person, viz, the jury. Certainly, all the words and phrases in statement 3 are of the kind generally used to express statements of fact: "Our entry was determined;" "the certainty that if the Allies did not win, J. P. Morgan's loans to the Allies would be repudiated;" "those American investors who bit on his" (Mr. Morgan's) "promises would be hooked."

It can not, we think, but be noticed that the principal force of statement 3 lies in an appearance (to say the least) of positive knowledge and consequent statement of fact in regard to the connection of "capitalistic" forces with the war. The author is sure of himself upon this point as a matter of fact, and there seems to be no reason in common sense why the jury were not entitled, from their point of view, to be equally sure of themselves to the exact contrary.

Assuming, then, that statement 3 was one of objective fact, as distinguished from one of mere opinion or conclusion, it belongs, we submit, to the class of statements so manifestly out of accord with anything known at present by anybody as to amount to a statement of whose falsity the jury could take judicial notice; or, as to amount to a statement as to which the judge was bound to charge the jury that its falsity was demonstrated by facts within the knowledge of everybody; even if it be assumed that the President's message was not relevant. That message, however, being, in our judgment, clearly relevant, the jury were amply justified in basing their verdict on it.

The condition, viz, that the statement of fact shall be false, was, therefore, properly found by the jury to exist in this case.

Assignment of error 20 (Rec. 282) to the effect that the defendants were entitled to rely on the author of the pamphlet as to the truth or falsity of its state-

ments is without merit. It is settled that one who publishes a libel can not justify by the plea that he relied upon the source from which he received it.

Assignment of error 21 complains of the charge of the court to the effect that it was the duty of the defendants to investigate the truth or falsity of the statements made in the pamphlet before they circulated it. This charge was clearly correct, as we have pointed out above on page 12 in speaking of the third condition. In so far as the mental attitude of the defendant is relevant, the law does not require proof of actual knowledge upon his part that the statement was false. Persons who circulate indiscriminately among the public statements of fact regarding matters of great public importance are under a legal duty to make a bona fide, fairly thorough investigation of the truth or falsity of such statements. If they circulate them without any such investigation, they must be held to have circulated them recklessly, without caring whether they were true or false, a state of mind equivalent, even in the criminal law, to actual knowledge of their falsity.

IV.

ASSIGNMENT OF ERROR 22.

This assignment complains of the charge of the court (Rec. 220) to the effect that it was immaterial whether any person who had been accepted for the Army received one of the pamphlets or not. The charge was clearly correct. *O'Hare* v. *United States*, 253 Fed. 538; *Poe* v. *United States*, 253 Fed. 908; *Kraft* v. *United States*, 249 Fed. 919, 924; *Rhubery*

v. *United States*, 255 Fed. 865, 870, 871; *Coldwell* v. *United States*, 256 Fed. 805, 811; *Schenck* v. *United States*, 249 U. S. 47, 52.

V.

IF THE VERDICT AND SENTENCE ARE GOOD AS TO ANY ONE COUNT, THE JUDGMENT MUST BE AFFIRMED.

The sentences in the case at bar (Rec. 274, 275) were, as to Pierce, ten months upon each of the first, second, third, and sixth counts and a fine upon each of the third and sixth counts; as to Creo, one year upon each of said counts and a fine upon the same two counts; as to Zeilman, eight months upon each of said counts and a fine upon the same two counts. Nothing is said in the judgment as to whether the sentences shall be served concurrently or successively. When that is the case it is settled that the sentences run concurrently. *Kirkman* v. *McClaughry*, 152 Fed. 255, 258. *Buessel* v. *U. S.* 258 Fed. 811, 821, 822. Therefore, under the established rule of this court it is sufficient as to Pierce, Creo, and Zeilman if the conviction on any one of the first, second, third, or sixth counts was justified. As to Nelson, of course, the case is different, since he was only convicted on the third count (Rec. 274).

CONCLUSION.

The judgment of the court below should be affirmed.

R. P. STEWART,
Assistant Attorney General.
W. C. HERRON,
Attorney.

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PIERCE ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 234. Argued November 18, 19, 1919.—Decided March 8, 1920.

The decision in another case of a constitutional question which formed the jurisdictional basis for a direct writ of error previously sued out under Jud. Code, § 238, does not divest this court of its jurisdiction to determine the other questions raised in the record. P. 242.

In order to constitute a conspiracy, within § 4 of the Espionage Act, to commit a substantive offense defined in § 3, it is not essential that the conspirators shall have agreed in advance upon the precise method of violating the law; and, while the averment of the conspiracy cannot be aided by the allegations of overt acts and the conspiracy is not punishable unless such acts were committed, they need not be in themselves criminal, still less constitute the very crime which is the object of the conspiracy. P. 243.

Averments in such an indictment that defendants unlawfully, wilfully or feloniously committed the forbidden acts import an unlawful motive. P. 244.

Whether statements contained in a pamphlet circulated by defendants tended to produce the consequences forbidden by the Espionage Act, (§ 3), as alleged, *held* a matter to be determined by the jury, and not by the court on demurrer to the indictment. *Id.*

Evidence in the case examined and *held* sufficient to warrant the jury's finding that defendants, in violation of the Espionage Act, conspired to commit, and committed, the offense of attempting to cause insubordination and disloyalty and refusal of duty in the military and naval forces, and made and conveyed false statements with intent to interfere with the operation and success of those forces, in the war with Germany, by circulating pamphlets and other printed matter tending in the circumstances to produce those results. P. 245.

The fact that defendants distributed such pamphlets with a full understanding of their contents furnished of itself a ground for attributing to them an intent, and for finding that they attempted, to bring about any and all such consequences as reasonably might be anticipated from their distribution. P. 249.

In a prosecution for circulating false statements with intent to interfere with the operation and success of the military and naval forces, in violation of the Espionage Act, § 3, where the falsity of the statements in question appears plainly, as a matter of common knowledge and public fact, other evidence on that subject is not needed in order to sustain a verdict of guilty. P. 250.

In such cases it is for the jury to determine whether the statements circulated should be taken literally or in an innocent, figurative sense, in view of the class and character of the people among whom the statements were circulated. P. 251.

To circulate such false statements recklessly, without effort to ascertain the truth, is equivalent to circulating them with knowledge of their falsity. *Id.*

The fact that the statements in question do not, to the common understanding, purport to convey anything new but only to interpret or comment on matters pretended to be facts of public knowledge, does not remove them from the purview of § 3 of the Espionage Act. P. 252.

The insufficiency of one of several counts of an indictment upon which concurrent sentences have been imposed does not necessitate reversal where the other counts sustain the total punishment inflicted. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. Frederick A. Mohr for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiffs in error were jointly indicted October 2, 1917, in the United States District Court for the Northern District of New York, upon six counts, of which the 4th and 5th were struck out by agreement at the trial and the 1st is now abandoned by the Government.

The 2d count charged that throughout the period from

April 6, 1917, to the date of the presentation of the indictment, the United States being at war with the Imperial German Government, defendants at the City of Albany, in the Northern District of New York and within the jurisdiction, etc., unlawfully and feloniously conspired together and with other persons to the grand jurors unknown to commit an offense against the United States, to wit, "The offense of unlawfully, feloniously and willfully attempting to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States when the United States was at war and to the injury of the United States in, through, and by personal solicitations, public speeches and distributing and publicly circulating throughout the United States certain articles printed in pamphlets called 'The Price We Pay,' which said pamphlets were to be distributed publicly throughout the Northern District of New York, and which said solicitations, speeches, articles and pamphlets would and should persistently urge insubordination, disloyalty and refusal of duty in the said military and naval forces of the United States to the injury of the United States and its military and naval service and failure and refusal on the part of available persons to enlist therein and should and would through and by means above mentioned obstruct the recruiting and enlistment service of the United States when the United States was at war to the injury of that service and of the United States." For overt acts it was alleged that certain of the defendants, in the City of Albany at times specified, made personal solicitations and public speeches, and especially that they published and distributed to certain persons named and other persons to the grand jurors unknown certain pamphlets headed "The Price We Pay," a copy of which was annexed to the indictment and made a part of it.

The 3d count charged that during the same period and on August 26, 1917, the United States being at war, etc.,

defendants at the City of Albany, etc., wilfully and feloniously made, distributed, and conveyed to certain persons named and others to the grand jurors unknown certain false reports and false statements in certain pamphlets attached to and made a part of the indictment and headed "The Price We Pay," which false statements were in part as shown by certain extracts quoted from the pamphlet, with intent to interfere with the operation and success of the military and naval forces of the United States.

The 6th count charged that at the same place, during the same period and on August 27, 1917, while the United States was at war, etc., defendants willfully and feloniously attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval service of the United States by means of the publication, circulation, and distribution of "The Price We Pay" to certain persons named and others to the grand jurors unknown.

A general demurrer was overruled, whereupon defendants pleaded not guilty and were put on trial together, with the result that Pierce, Creo, and Zeilman were found guilty upon the 1st, 2d, 3d and 6th counts, and Nelson upon the 3d count only. Each defendant was separately sentenced to a term of imprisonment upon each count on which he had been found guilty; the several sentences of Pierce, Creo, and Zeilman, however, to run concurrently.

The present direct writ of error was sued out under § 238, Judicial Code, because of contentions that the Selective Draft Act and the Espionage Act were unconstitutional. These have since been set at rest. *Selective Draft Law Cases*, 245 U. S. 366; *Schenck* v. *United States*, 249 U. S. 47, 51; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211, 215. But our jurisdiction continues for the purpose of disposing of other questions raised in the record. *Brolan* v. *United States*, 236 U. S. 216.

It is insisted that there was error in refusing to sustain the demurrer, and this on the ground that (1) the facts and circumstances upon which the allegation of conspiracy rested were not stated; (2) there was a failure to set forth facts or circumstances showing unlawful motive or intent; (3) there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act; and (4) that the statements contained in the pamphlet were not such as would naturally produce the forbidden consequences.

What we have recited of the 2d count shows a sufficiently definite averment of a conspiracy and overt acts under the provisions of Title I of the Espionage Act.[1] The 4th section makes criminal a conspiracy "to violate the provisions of sections two or three of this title," provided one or more of the conspirators do any act to

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[1] Extract from Act of June 15, 1917, c. 30, 40 Stat. 217, 219.

Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

effect the object of the conspiracy. Such a conspiracy, thus attempted to be carried into effect, is none the less punishable because the conspirators fail to agree in advance upon the precise method in which the law shall be violated. It is true the averment of the conspiracy cannot be aided by the allegations respecting the overt acts. *United States* v. *Britton*, 108 U. S. 199, 205; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 536. On the other hand, while under § 4 of the Espionage Act, as under § 37 of the Criminal Code, a mere conspiracy, without overt act done in pursuance of it, is not punishable criminally, yet the overt act need not be in and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. *United States* v. *Rabinowich*, 238 U. S. 78, 86; *Goldman* v. *United States*, 245 U. S. 474, 477.

As to the second point: Averments that defendants unlawfully, willfully, or feloniously committed the forbidden acts fairly import an unlawful motive; the 3rd count specifically avers such a motive; the conspiracy charged in the 2d and the willful attempt charged in the 6th necessarily involve unlawful motives.

The third and fourth objections point to no infirmity in the averments of the indictment. Whether the statements contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial. There was no error in overruling the demurrer.

Upon the trial, defendants' counsel moved that the jury be directed to acquit the defendants, upon the ground that the evidence was not sufficient to sustain a conviction. Under the exceptions taken to the refusal of this motion it is urged that there was no proof (a) of conspiracy, (b) of criminal purpose or intent, (c) of the falsity of the statements contained in the pamphlet cir-

culated, (d) of knowledge on defendants' part of such falsity, or (e) of circumstances creating a danger that its circulation would produce the evils which Congress sought to prevent; and further (f) that the pamphlet itself could not legitimately be construed as tending to produce the prohibited consequences.

The pamphlet—"The Price We Pay"—was a highly colored and sensational document, issued by the national office of the Socialist Party at Chicago, Illinois, and fairly to be construed as a protest against the further prosecution of the war by the United States. It contained much in the way of denunciation of war in general, the pending war in particular; something in the way of assertion that under Socialism things would be better; little or nothing in the way of fact or argument to support the assertion. It is too long to be quoted in full. The following extracts will suffice; those indicated by italics being the same that were set forth in the body of the 3d count:

"Conscription is upon us; the draft law is a fact!

"*Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;*

"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

"Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

"Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

"Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

"*And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;*

"And still the toll of death will grow.

* * * * * * * *

"The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say 'Must we—be that!'

"You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

"It is the price you pay for your stupidity—you who have rejected Socialism.

* * * * * * * *

"Food prices go up like skyrockets; and show no sign of bursting and coming down.

* * * * * * * *

"*The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.*

* * * * * * * *

"This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;

"'Get ready for the commercial war that will follow this war.'

"Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

* * * * * * * *

"This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

"But go to it! Believe everything you are told—you always have, and doubtless always will, believe them.

* * * * * * * *

"For this war — as every one who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

"It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.

"*Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked.*"

These expressions were interspersed with suggestions that the war was the result of the rejection of Socialism, and that Socialism was the "salvation of the human race."

It was in evidence that defendants were members of the Socialist Party—a party "organized in locals throughout the country"—and affiliated with a local branch in the City of Albany. There was evidence that at a meeting of that branch, held July 11, 1917, at which Pierce was present, the question of distributing "The Price We Pay" was brought up, sample copies obtained from the national organization at Chicago having been produced for examination and consideration; that the pamphlet was discussed, as well as the question of ordering a large number of copies from the national organization for distribution; it was stated that criminal proceed-

ings were pending in the United States District Court for the District of Maryland against parties indicted for distributing the same pamphlet; some of the members present, one of them an attorney, advised against its distribution, and a motion was adopted not to distribute it until it was known to be legal. However, some action appears to have been taken towards procuring copies for distribution, for on July 17th a large bundle of them, said to have been 5,000 copies, was delivered at Pierce's house by the literature agent of the Albany local. At a meeting held July 25 the subject was again brought up, it having become known that in the criminal proceedings before mentioned the court had directed a verdict of acquittal; thereupon the resolution of July 11 was rescinded and distributors were called for. On July 29, defendants Pierce, Creo, and Zeilman met at Pierce's house about half past 5 o'clock in the morning, and immediately began distributing the pamphlets in large numbers throughout the City of Albany. Each of them took about 500 copies, and having agreed among themselves about the division of the territory, they went from house to house, leaving a copy upon each doorstep. They repeated this on successive Sundays until August 26, when they were arrested. Nelson acted with them as a distributor on the latter date, and perhaps on one previous occasion.

There was evidence that in some instances a leaflet entitled "Protect Your Rights," and bearing the Chicago address of the national office of the Socialist Party, was folded between the pages of the pamphlet. The leaflet was a fervid appeal to the reader to join the Socialist Party, upon the ground that it was the only organization that was opposing the war. It declared among other things: "This organization has opposed war and conscription. It is still opposed to war and conscription. . . . Do you want to help in this struggle? . . . The party needs you now as it never needed you before. You

need the party now as you never needed it before. Men are going to give up their lives for a cause which you are convinced is neither great or noble, will you then begrudge your best efforts to the cause that you feel certain is both great and noble and in which lives the only hope and promise of the future?" And there was evidence of declarations made by Pierce on the 16th and 17th of August, amounting to an acknowledgment of a treasonable purpose in opposing the draft, which he sought to excuse on the ground that he had "no use for England."

It was shown without dispute that defendants distributed the pamphlet—"The Price We Pay"—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution. If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged. Evidently it was intended, as the jury found, to interfere with the conscription and recruitment services; to cause men eligible for the service to evade the draft; to bring home to them, and especially to their parents, sisters, wives, and sweethearts, a sense of impending personal loss, calculated to discourage the young men from entering the service; to arouse suspicion as to whether the chief law officer of the Government was not more concerned in enforcing the strictness of military discipline than in protecting the people against improper speculation in their food supply; and to produce a belief that our

participation in the war was the product of sordid and sinister motives, rather than a design to protect the interests and maintain the honor of the United States.

What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. Defendants took the witness-stand and severally testified, in effect, that their sole purpose was to gain converts for Socialism, not to interfere with the operation or success of the naval or military forces of the United States. But their evidence was far from conclusive, and the jury very reasonably might find—as evidently they did—that the protestations of innocence were insincere, and that the real purpose of defendants—indeed, the real object of the pamphlet—was to hamper the Government in the prosecution of the war.

Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution. *Schenck* v. *United States*, 249 U. S. 47, 52; *Frohwerk* v. *United States*, 249 U. S. 204, 208; *Debs* v. *United States*, 249 U. S. 211, 215.

Concert of action on the part of Pierce, Creo, and Zeilman clearly appeared, and, taken in connection with the nature of the pamphlet and their knowledge of its contents, furnished abundant evidence of a conspiracy and overt acts to sustain their conviction upon the second count.

The validity of the conviction upon the third count (the only one that includes Nelson), depends upon whether there was lawful evidence of the falsity of the statements contained in the pamphlet and tending to show that,

knowing they were false, or disregarding their probable falsity, defendants willfully circulated it, with intent to interfere with the operation or success of the military or naval forces of the United States. The criticism of the evidence admitted to show the untruth of the statements about the Attorney General and about J. P. Morgan's loans to the Allies is not well founded; the evidence was admissible; but we hardly see that it was needed to convince a reasonable jury of the falsity of these and other statements contained in the pamphlet. Common knowledge (not to mention the President's Address to Congress of April 2, 1917, and the Joint Resolution of April 6 declaring war, which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false; and such common knowledge went to prove also that defendants knew they were untrue. That they were false if taken in a literal sense hardly is disputed. It is argued that they ought not to be taken literally. But when it is remembered that the pamphlet was intended to be circulated, and so far as defendants acted in the matter was circulated, among readers of all classes and conditions, it cannot be said as matter of law that no considerable number of them would understand the statements in a literal sense and take them seriously. The jury was warranted in finding the statements false in fact, and known to be so by the defendants, or else distributed recklessly, without effort to ascertain the truth (see *Cooper* v. *Schlesinger*, 111 U. S. 148, 155), and circulated willfully in order to interfere with the success of the forces of the United States. This is sufficient to sustain the conviction of all of the defendants upon the third count.

There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal upon any of the counts. The

question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

It is suggested that the clause of § 3—"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies"—cannot be construed to cover statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge; and that however false the statements and with whatever evil purpose circulated, they are not punishable if accompanied with a pretense of commenting upon them as matters of public concern. We cannot accept such a construction; it unduly restricts the natural meaning of the clause, leaves little for it to operate upon, and disregards the context and the circumstances under which the statute was passed. In effect, it would allow the professed advocate of disloyalty to escape responsibility for statements however audaciously false, so long as he did but reiterate what had been said before; while his ignorant dupes, believing his statements and thereby persuaded to obstruct the recruiting or enlistment service, would be punishable by fine or imprisonment under the same section.

Other assignments of error pointing to rulings upon evidence and instructions given or refused to be given to the jury are sufficiently disposed of by what we have said.

The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo, and Zeilman did not exceed that which lawfully might have been imposed under the second, third, or sixth counts, so that the concurrent sentence under the first count adds nothing to their punish-

ment. *Claassen* v. *United States*, 142 U. S. 140, 146; *Evans* v. *United States*, (2 cases) 153 U. S. 584, 595, 608; *Putnam* v. *United States*, 162 U. S. 687, 714; *Abrams* v. *United States*, 250 U. S. 616, 619.

Judgments affirmed.

MR. JUSTICE BRANDEIS, dissenting, delivered the following opinion in which MR. JUSTICE HOLMES concurred.

What is called "distributing literature" is a means commonly used by the Socialist Party to increase its membership and otherwise to advance the cause it advocates. To this end the national organization with headquarters at Chicago publishes such "literature" from time to time and sends sample copies to the local organizations. These, when they approve, purchase copies and call upon members to volunteer for service in making the distribution locally. Sometime before July 11, 1917, a local of the Socialist Party at Albany, New York, received from the national organization sample copies of a four-page leaflet entitled "The Price We Pay," written by Irwin St. John Tucker, an Episcopal clergyman and a man of sufficient prominence to have been included in the 1916–1917 edition of "Who's Who in America." The proposal to distribute this leaflet came up for action at a meeting of the Albany local held on July 11, 1917. A member who was a lawyer called attention to the fact that the question whether it was legal to distribute this leaflet was involved in a case pending in Baltimore in the District Court of the United States; and it was voted "not to distribute 'The Price We Pay' until we know if it is legal." The case referred to was an indictment under the Selective Draft Act for conspiracy to obstruct recruiting by means of distributing the leaflet. Shortly after the July 11th meeting it became known that District Judge Rose had directed an acquittal in that case; and at the next meet-

ing of the local, held July 25th, it was voted to rescind the motion "against distributing 'The Price We Pay' and call for distributors." Four members of the local, two of them native Americans, one a naturalized citizen, and the fourth a foreigner who had filed his first naturalization papers, volunteered as distributors. They distributed about five thousand copies by hand in Albany.

District Judge Rose in directing an acquittal had said of the leaflet in the Baltimore case:

"I do not think there is anything to go to the jury in this case.

"You may have your own opinions about that circular; I have very strong individual opinions about it, and as to the wisdom and fairness of what is said there; but so far as I can see it is principally a circular intended to induce people to subscribe to Socialist newspapers and to get recruits for the Socialist Party. I do not think that we ought to attempt to prosecute people for that kind of thing. It may be very unwise in its effect, and it may be unpatriotic at that particular time and place, but it would be going very far indeed, further, I think than any law that I know of would justify, to hold that there has been made out any case here even tending to show that there was an attempt to persuade men not to obey the law."

In New York a different view was taken; and an indictment in six counts was found against the four distributors. Two of the counts were eliminated at the trial. On the other four there were convictions, and on each a sentence of fine and imprisonment. But one of the four counts was abandoned by the Government in this court. There remain for consideration count three, which charges a violation of § 3 of the Espionage Act by making false reports and false statements, with the intent "to interfere with the operation and success of the military and naval forces"; and counts two and six, also involving § 3 of the Espionage Act, the one for conspiring, the other for at-

tempting, "to cause insubordination, disloyalty and refusal of duty in the military and naval forces." Demurrers to the several counts and motions that a verdict be directed for the several defendants were overruled.

In considering the several counts it is important to note that three classes of offences are included in § 3 of the Espionage Act, and that the essentials of liability under them differ materially. The first class, under which count three is drawn, is the offence of making or conveying false statements or reports with intent to interfere with the operations or success of the military and naval forces. The second, involved in counts two and six is that of attempting to cause insubordination, disloyalty, mutiny, or refusal of duty. With the third, that of obstructing the recruiting and enlistment service, we have, since the abandonment of the first count, no concern here. Although the uttering or publishing of the words charged be admitted, there necessarily arises in every case—whether the offence charged be of the first class or of the second—the question whether the words were used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent," *Schenck* v. *United States*, 249 U. S. 47, 52; and also the question whether the act of uttering or publishing was done willfully, that is, with the intent to produce the result which the Congress sought to prevent. But in cases of the first class three additional elements of the crime must be established, namely:

(1) The statement or report must be of something capable of being proved false in fact. The expression of an opinion, for instance, whether sound or unsound, might conceivably afford a sufficient basis for the charge of attempting to cause insubordination, disloyalty or refusal of duty, or for the charge of obstructing recruiting; but, because an opinion is not capable of being proved

false in fact, a statement of it cannot be made the basis of a prosecution of the first class.

(2) The statement or report must be proved to be false.

(3) The statement or report must be known by the defendant to be false when made or conveyed.

In the case at bar the alleged offence consists wholly in distributing leaflets which had been written and published by others. The fact of distribution is admitted. But every other element of the two classes of crime charged must be established in order to justify conviction. With unimportant exceptions to be discussed later, the only evidence introduced to establish the several elements of both of the crimes charged is the leaflet itself; and the leaflet is unaffected by extraneous evidence which might give to words used therein special meaning or effect. In order to determine whether the leaflet furnishes any evidence to establish any of the above enumerated elements of the offences charged, the whole leaflet must necessarily be read. It is as follows:

"THE PRICE WE PAY.

By Irwin St. John Tucker.

I.

"Conscription is upon us: the draft law is a fact!

Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;

Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

Into that seething, heaving swamp of torn flesh and

floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

And still the toll of death will grow.

Let them come! Let death and desolation make barren every Home! Let the agony of war crack every parent's heart! Let the horrors and miseries of the world-downfall swamp the happiness of every hearthstone!

Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!

II.

"Yesterday I saw moving pictures of the Battle of the Somme. A company of Highlanders was shown, young and handsome in their kilts and brass helmets and bright plaids.

They laughed and joked as they stood on the screen in their ranks at ease, waiting the command to advance.

The camera shows rank after rank, standing strong and erect, smoking and chaffing with one another;

Then it shows a sign: 'Less than 20 per cent. of these soldiers were alive at the close of the day.'

Only one in five remained of all those laddies, when sunset came, the rest were crumpled masses of carrion under their torn plaids.

Many a highland home will wail and croon for many a

year, because of these crumpled masses of carrion, wrapped in their plaids, upon a far French hillside.

I saw a regiment of Germans charging downhill against machine gunfire. They melted away like snowflakes falling into hot water.

The hospital camps were shown, with hundreds and thousands of wounded men in all stages of pain and suffering, herded like animals, milling around like cattle in the slaughter pens.

All the horror and agony of war were exhibited; and at the end a flag was thrown on the screen and a proclamation said: 'Enlist for your Country!' The applause was very thin and scattering; and as we went out, most of the men shook their heads and said:

'That's a hell of a poor recruiting scheme!'

For the men of this land have been fed full with horror during the past three years; and tho the call for volunteers has become wild, frantic, desperate; tho the posters scream from every billboard, and tho parades and red fire inflame the atmosphere in every town;

The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say 'Must we—be that!'

You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

It is the price you pay for your stupidity—you who have rejected Socialism.

III.

"Food prices go up like skyrockets; and show no sign of bursting and coming down.

Wheat, corn, potatoes, are far above the Civil War mark; eggs, butter, meat—all these things are almost beyond a poor family's reach.

The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.

Starvation begins to stare us in the face—and we, people of the richest and most productive land on earth are told to starve ourselves yet further because our allies must be fed.

Submarines are steadily sending to the fishes millions of tons of food stuffs; and still we build more ships, and send more food, and more and more is sunk;

Frantically we grub in the earth and sow and tend and reap; and then as frantically load the food in ships, and then as frantically sink with them—

We, the 'civilized nations' of the world!

While the children of the poor clamor for their bread and the well to do shake their heads and wonder what on earth the poor folks are doing;

The poor folks are growling and muttering with savage side-long glances, and are rolling up their sleeves.

For the price they pay for their stupidity is getting beyond their power to pay!

IV.

"Frightful reports are being made of the ravages of venereal diseases in the army training camps, and in the barracks where the girl munition workers live.

One of the great nations lost more men thru loathsome immoral diseases than on the firing line, during the first 18 months of the war.

Back from the Mexican border our boys come, spreading the curse of the great Black Plague among hundreds of thousands of homes; blasting the lives of innocent women and unborn babes,

Over in Europe ten millions of women are deprived of their husbands, and fifty millions of babies can never be;

Of those women who will have their mates given back to them, there are twenty millions who will have ruined wrecks of men; mentally deranged, physically broken, morally rotten;

Future generations of families are made impossible; blackness and desolation instead of happiness and love will reign where the homes of the future should be;

And all because you believed the silly lie, that 'Socialism would destroy the home!'

Pound on, guns of the embattled host; wreck yet more homes, kill yet more husbands and fathers, rob yet more maidens of their sweethearts, yet more babies of their fathers;

That is the price the world pays for believing the monstrous, damnable, outrageous lie that Socialism would destroy the home!

Now the homes of the world are being destroyed; every one of them would have been saved by Socialism. But you would not believe. Now pay the price!

V.

"This war, you say, is all caused by the Kaiser; and we are fighting for democracy against autocracy. Once dethrone the Kaiser and there will be permanent peace.

That is what they said about Napoleon. And in the century since Napoleon was overthrown there has been more and greater wars than the world ever saw before.

There were wars before Germany ever existed; before Rome ruled; before Egypt dominated the ages.

War has been universal; and the cause of war is always the same. Somebody wanted something somebody else possessed and they fought over the ownership of it.

This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;

'Get ready for the commercial war that will follow this war.'

Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

And as soon as the guns are stilled and the dead are buried, commercial forces will prepare for the next bloody struggle over routes and ports and rights, coal mines and railroads;

For these are the essence of this, as of all other wars!

This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

But go to it! Believe everything you are told—you always have and doubtless always will, believe them.

Only do retain this much reason; when you have paid the price, the last and uttermost price; and have not received what you were told you were fighting for—namely Democracy—

Then remember that the price you paid was not the purchase price for justice, but the penalty price for your stupidity!

VI.

"We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely killing.

Every man, every woman, every child, must 'do his bit' in the service of destruction.

We have been telling you for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity but you have laughed at us.

Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you

have turned the whole energy of the nations of the world into the service of their kings for the purpose of killing—killing—killing.

Why would you not believe us when we told you that it was possible to coöperate for the saving of life?

Why were you not interested when we begged you to work all together to build, instead to destroy? To preserve, instead of to murder?

Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellowworkers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded—you are paying for them now.

— Lo, the price you pay! Lo, the price your children will pay. Lo, the agony, the death, the blood, the unforgettable sorrow,—

The price of your stupidity!

For this war—as every one who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.

Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked.

Socialism would have settled that question; it would determine that to every producer shall be given all the value of what he produces; so that nothing would be left over for exploiters or investors.

With that great question settled there would be no cause for war.

Until the question of surplus profits is settled that way, wars will continue; each war being the prelude to a still vaster and greater outburst of hell;

Until the world becomes weary of paying the stupendous price for its own folly;

Until those who are sent out to maim and murder one another for the profit of bankers and investors determine to have and to hold what they have fought for;

Until money is no more sacred than human blood;

Until human life refuses to sacrifice itself for private gain;

Until by the explosion of millions of tons of dynamite the stupidity of the human race is blown away, and Socialism is known for what it is, the salvation of the human race;

Until then—you will keep on paying the price!

IF THIS INTERESTS YOU, PASS IT ON.

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Subscribe to The American Socialist, published weekly by the National Office, Socialist Party, 803 West Madison Street, Chicago, Ill., 50 cents per year, 25 cents for 6 months. It is a paper without a muzzle.

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Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

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To the National Office, Socialist Party, 803 W. Madison St., Chicago, Ill.

I am interested in the Socialist Party and its principles. Please send me samples of its literature.

Name.....

Address.....

City.....State.....”

First: From this leaflet, which is divided into six

chapters, there are set forth in count three, five sentences as constituting the false statements or reports wilfully conveyed by defendants with the intent to interfere with the operation and success of the military and naval forces of the United States.

(a) Two sentences are culled from the first chapter. They follow immediately after the words: "Conscription is upon us; the draft law is a fact"—and a third sentence culled follows a little later. They are:

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army. . . . And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

To prove the alleged falsity of these statements the Government gravely called as a witness a major in the regular army with 28 years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system and that the word impress has no place in the recruiting service. The subject of his testimony was a matter not of fact but of law; and as a statement of law it was erroneous. That "recruiting is gaining fresh supplies for the forces, as well by draft as otherwise" had been assumed by the Circuit Court of Appeals for that circuit in *Masses Publishing Co.* v. *Patten*, 246 Fed. Rep. 24 (decided eleven days before this testimony was given), and was later expressly held by this court in *Schenck* v. *United States*, 249 U. S. 47, 53. The third of the sentences charged as false was obviously neither a statement nor a report, but a prediction; and it was later verified.[1] That the prediction

[1] On May 20, 1918, c. 79, 40 Stat. 557, Congress, by joint resolution, extended the draft to males who had since June 5, 1917, attained the age of twenty-one and authorized the President to extend it to those

made in the leaflet was later verified is, of course, immaterial; but the fact shows the danger of extending beyond its appropriate sphere the scope of a charge of falsity.

(*b*) The fourth sentence set forth in the third count as a false statement was culled from the third chapter of the leaflet and is this:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has not time to protect the food supply from gamblers."

To prove the falsity of this statement the Government called the United States Attorney for that district who testified that no federal law makes it a crime not to stand up when the "Star Spangled Banner" is played and that he has no knowledge of any one being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the Government, is presumed to do his duty and not to violate his duty and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place those present, whether in uniform or in civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout the war.

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thereafter attaining that age. Under this act, June, 5, 1918, was fixed as the date for the Second Registration. Subsequently, August 24, 1918, was fixed for the supplemental registration of all coming of age between June 5, 1918, and August 24, 1918. 40 Stat. 1834; 40 Stat. 1781. By Act of August 31, 1918, c. 166, 40 Stat. 955, the provisions of the draft law were extended to persons between the ages of eighteen and forty-five. Under this act, September 12, 1918, was fixed as the date for the Third Registration. 40 Stat. 1840.

There was no federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was, therefore, not engaged in sending men to prison for that offence. But when the passage in question is read in connection with the rest of the chapter, it seems clear that it was intended, not as a statement of fact, but as a criticism of the Department of Justice for devoting its efforts to prosecutions for acts or omissions indicating lack of sympathy with the war, rather than to protecting the community from profiteering by prosecuting violators of the Food Control Act. (August 10, 1917, c. 53, 40 Stat. 276.) Such criticisms of governmental operations, though grossly unfair as an interpretation of facts or even wholly unfounded in fact, are not "false reports or false statements with intent to interfere with the operation or success of the military or naval forces."

(c) The remaining sentence, set forth in count three as a false statement, was culled from the sixth chapter of the leaflet and is this:

"Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

To prove the falsity of this statement the Government introduced the address made by the President to Congress on April 2, 1917, which preceded the adoption of the Joint Resolution of April 6, 1917, declaring that a state of war exists between the United States and the Imperial German Government (c. 1, 40 Stat. 1). This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law; and which is sometimes spoken of as a finding of ultimate fact as distinguished from an evidentiary fact. But, in its essence it is the expression of a judgment—like the

statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 104, is applicable:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

The cause of a war—as of most human action—is not single. War is ordinarily the result of many coöperating causes, many different conditions, acts and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimize both prejudice and other sources of error. For individuals, and classes of individuals, attach significance to those things which are significant to them. And, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis so as to weigh and value the various elements, the historians differ necessarily in their judgments. One finds the determining cause of war in a great man, another in an idea, a belief, an economic necessity, a trade advantage, a sinister machination, or an accident. It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world's history.

That all who voted for the Joint Resolution of April 6,

1917, did not do so for the reasons assigned by the President in his address to Congress on April 2, is demonstrated by the discussions in the House and in the Senate.[1] That debate discloses also that both in the Senate and in the House the loans to the Allies and the desire to ensure their repayment in full were declared to have been instrumental in bringing about in our country the sentiment in favor of the war.[2] However strongly we may believe

[1] See 55 Cong. Rec. 253, 254, 344, 354, 357, 407.

[2] Discussion in the Senate April 4, 1917:

" . . . there is no doubt in any mind but the enormous amount of money loaned to the allies in this country has been instrumental in bringing about a public sentiment in favor of our country taking a course that would make every bond worth a hundred cents on the dollar and making the payment of every debt certain and sure." (55 Cong. Rec. p. 213.)

Discussion in the House April 5, 1917.

"Since the loan of $500,000,000 was made by Morgan to the allies their efforts have been persistent to land our soldiers in the French trenches." (55 Cong. Rec. p. 342.)

"Already we have loaned the allies, through our banking system, up to December 31, 1916, the enormous sum of $2,325,900,000 in formal loans. Other huge sums have been loaned and millions have been added since that date. 'Where your treasures are, there will be your heart also.' That is one of the reasons why we are about to enter this war. No wonder the Morgans and the munition makers desire war. . . . Our financiers desire that Uncle Sam underwrite these and other huge loans and fight to defend their financial interests, that there may be no final loss." (55 Cong. Rec. p. 362.)

"I believe that all Americans, except that limited although influential class which is willing to go on shedding other men's blood to protect its investments and add to its accursed profits, have abhorred the thought of war." (55 Cong. Rec. p. 386).

"Likewise, Mr. Chairman, the J. Pierpont Morgans and their associates, who have floated war loans running into millions which they now want the United States to guarantee by entering the European war. . . ." (55 Cong. Rec. p. 372.)

"These war germs are both epidemic and contagious. They are in the air, but somehow or other they multiply fastest in the fumes around the munition factories. You will not find many in our climate.

that these loans were not the slightest makeweight, much less a determining factor, in the country's decision, the fact that some of our representatives in the Senate and the House declared otherwise on one of the most solemn occasions in the history of the Nation, should help us to understand that statements like that here charged to be false are in essence matters of opinion and judgment, not matters of fact to be determined by a jury upon or without evidence; and that even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false. All the alleged false statements were an interpretation and discussion of public facts of public interest. If the proceeding had been for libel, the defence of privilege might have been interposed. *Gandia* v. *Pettingill*, 222 U. S. 452. There is no reason to believe that Congress, in prohibiting a special class of false statements, intended to interfere with what was obviously comment as distinguished from a statement.

The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of facts or expressions of opinion. As this determination was to be made from the reading of the leaflet unaffected by any extrinsic evidence the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental.

They also multiply pretty fast in Wall Street and other money centers. I am opposed to declaring war to save the speculators." (55 Cong. Rec. p. 376.)

There is nothing in the act compelling or indeed justifying such a construction of it; and I cannot believe that Congress in passing, and the President in approving, it conceived that such a construction was possible.

Second: But, even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus there was not a particle of evidence that the defendants knew that the statements were false. They were mere distributors of the leaflet. It had been prepared by a man of some prominence. It had been published by the national organization. Not one of the defendants was an officer even of the local organization. One of them, at least, was absent from the meetings at which the proposal to distribute the leaflet was discussed. There is no evidence that the truthfulness of the statements contained in the leaflet had ever been questioned before this indictment was found. The statement mainly relied upon to sustain the conviction—that concerning the effect of our large loans to the Allies—was merely a repetition of what had been declared with great solemnity and earnestness in the Senate and in the House while the Joint Resolution was under discussion. The fact that the President had set forth in his noble address worthy grounds for our entry into the war, was not evidence that these defendants knew to be false the charge that base motives had also been operative. The assertion that the great financial interests exercise a potent, subtle and sinister influence in the important decisions of our Government had often been made by men high in authority. Mr. Wilson, himself a historian, said before he was President and repeated in the New Freedom that: "The masters of the Government of the United States are the combined capitalists and manufacturers of the United

States." [1] We may be convinced that the decision to enter the great war was wholly free from such base influences but we may not, because such is our belief, permit a jury to find, in the absence of evidence, that it was proved beyond a reasonable doubt that these defendants *knew* that a statement in this leaflet to the contrary was false.

Nor was there a particle of evidence that these statements were made with intent to interfere with the operation or success of the military and naval forces. So far as there is any evidence bearing on the matter of intent, it is directly to the contrary. The fact that the local refused to distribute the pamphlet until Judge Rose had directed a verdict of acquittal in the Baltimore case shows that its members desired to do only that which the law permitted. The tenor of the leaflet itself shows that the intent of the writer and of the publishers was to advance the cause of Socialism; and each defendant testified that this was his only purpose in distributing the pamphlet. Furthermore, the nature of the words used and the circumstances under which they were used showed affirmatively that they did not "create a clear and present danger," that thereby the operations or success of our military and naval forces would be interfered with.

The gravamen of the third count is the charge of wilfully conveying in time of war false statements with the intent to interfere with the operation and success of our military or naval forces. One who did that would be called a traitor to his country. The defendants, humble members of the Socialist Party, performed as distributors of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under the third

[1] Page 57. Then follows: "It is written over every intimate page of the records of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy in this country have come from one source, not many sources."

count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.

Third: To sustain a conviction on the second or on the sixth count it is necessary to prove that by coöperating to distribute the leaflet the defendants conspired or attempted wilfully to "cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces." No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.

A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces. The leaflet contains lurid and perhaps exaggerated pictures of the horrors of war. Its arguments as to the causes of this war may appear to us shallow and grossly unfair. The remedy proposed may seem to us worse than the evil which, it is argued, will be thereby removed. But the leaflet, far from counselling disobedience to law, points to the hopelessness of protest, under the existing system, pictures the irresistible power of the military arm of the Government, and indicates that acquiescence is a necessity. Insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offences. Certainly there was no clear and present danger that such would be the result.

The leaflet was not even distributed among those in the military or the naval service. It was distributed among civilians; and since the conviction on the first count has been abandoned here by the Government, we have no occasion to consider whether the leaflet might have discouraged voluntary enlistment or obedience to the provisions of the Selective Draft Act.

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely, because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in "The Price We Pay."